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In The

Supreme Court of the United States

October Term, 1995

BLYTHEVILLE SCHOOL DISTRICT NO. 5, et al.,

Petitioners,

vs.

SHIRLEY HARVELL, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the district court's finding that African-American voters failed to establish that the at-large system of electing the Board of Directors of the Blytheville School District violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, was clearly-erroneous where for sixteen years up to and including the time of trial African-Americans were represented on the board roughly in proportion to their percentage of the voting age population?

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STATEMENT OF THE CASE

A. Opinions Below and Jurisdiction.

This case involves a challenge to the at-large system of electing the Board of Directors of the Blytheville School District based on Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1994), filed on November 14, 1989, in the United States District Court for the Eastern District of Arkansas.[1] Jurisdiction in the district court was pursuant to 42 U.S.C. §§ 1331 and 1343. A bench trial was conducted on November 8 and 9, 1990. On March 19, 1991, the district court issued a Memorandum Opinion and Order finding no violation of Section 2 and entered judgment dismissing Respondents' Complaint. App. 87; *Harvell v. Ladd*, 759 F. Supp. 525 (E.D.Ark. 1991).

Respondents appealed to the United States Court of Appeals for the Eighth Circuit. In an opinion filed on March 2, 1992, a panel of the Eighth Circuit reversed the judgment of the district court and remanded the case for

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[1] Petitioners are Blytheville School District No. 5, A Public Body Corporate; William Tomlinson, Individually and as Board Member; Norvell Moore, Individually and as Board Member; William Sullivan, Individually and as Board Member; Harold Sudbury, Jr., Individually and as Board Member; Helen Nunn, Individually and as Board Member; Karen Fraser, Individually and as Board Member; Steve Littrell, Individually and as Board Member; William Stovall, III, also known as Bill Stovall, Individually and as Board Member; Blytheville School District No. 5, Board of Directors; Dr. Frank Ladd, Individually and in his official capacity as Superintendent of Blytheville School District No. 5. Respondents are Shirley M. Harvell; Emmanuel Lofton, Reverend; Hattie Middlebrook; Mary Alice Jones; Jacquelin Henton.

additional findings of fact. App. 77; *Harvell v. Ladd*, 958 F.2d 226 (8th Cir. 1992). The district court filed additional findings of fact and conclusions of law on December 18, 1992, again holding that Respondents failed to establish a violation of Section 2. App. 63.

Respondents appealed, and again a panel of the Eighth Circuit reversed. App. 35; *Harvell v. Blytheville School Dist.*, 33 F.3d 910 (8th Cir. 1994). Petitioners moved for and were granted rehearing *en banc*, and the panel opinion was vacated. App. 34. In an opinion filed on December 5, 1995, the Eighth Circuit voted six to five to reverse the district court. App. 1; *Harvell v. Blytheville School Dist.*, 71 F.3d 1382 (8th Cir. 1995). From this decision, Petitioners seek review by this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

B. The Voting Rights Act.

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation.

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of

> circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

C. Concise Statement of Material Facts.

The Blytheville School District ("BSD") encompasses the City of Blytheville, Arkansas and the adjacent rural area. The BSD Board of Directors (the "Board") consists of eight members who are elected at-large to serve a term of four years. Candidates for the Board seek election to a designated position on the Board, but there are no eligibility requirements specific to any position. Elections are conducted for two board positions each year. Before 1988, candidates to the Board were elected under a plurality system. In 1987, the Arkansas Legislature enacted a majority vote requirement which is applicable to school board elections. *See* Ark. Code Ann. § 6-14-121 (Michie Repl. 1993).

According to the 1980 census,[2] the voting age population ("VAP") of BSD is 15,849, of which 70.3% is white and 28.9% is African-American. Def. 6. The African-American population of BSD is geographically compact and located on the south side of the City of Blytheville. App. 89; 759 F.Supp. at 526. The African-American population is also politically cohesive in that a majority of African-Americans usually vote for the same candidate. App. 66 and 91; 759 F.Supp. at 527-28.

From 1975 through the time of trial, African-American's were represented on the Board roughly in proportion to their percentage of the voting age population with two of the eight board members (25%) being African-American. In maintaining roughly proportional representation, two African-American candidates defeated white opponents in head-to-head races. In 1982, Dr. Helen Nunn, an African-American, received 56% of the vote to defeat a white opponent.[3] In 1987, Norvell Moore, an African-American, received 51% of the vote to defeat a white opponent. App. 32.

The table below sets forth the results of election contests involving African-American candidates from 1969 through 1992. African-American candidates are designated by "A-A" and white candidates are designated by "W."

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[2] This was the most current data available at the time of trial.

[3] In that same year, Ayre E. Lester, an African-American, lost to a white opponent by only 159 votes narrowly preventing the seating of a third African-American board member. App. 32.

YEAR	CANDIDATES	A-A/W	VOTES
1969	Dr. James C. Guard	W	1,014
	Mrs. Carrie B. White	A-A	769
1970	Mason F. Day, Jr.	W	2,212
	O.W. Weaver	A-A	1,074
1973	W.J. Tomlinson	W	1,068
	Rev. T.J. Green	A-A	907
1974	Edwin L. Holstead	W	415
	Dan M. Burge	W	885
	Ayre E. "Pop" Lester	A-A	1,232
1975	George "Preacher" Nichols	W	182
	Richard "Dick" Reid	W	582
	Bill D. Jackson	W	331
	Mrs. Allen Bush	W	812
	Norvell Moore	A-A	1,068
1978	Ayre E. "Pop" Lester	A-A	Unopposed
1979	Norvell Moore	A-A	Unopposed
1982	Jerry Nall	W	1,107
	Ayre E. "Pop" Lester	A-A	948
	Harold Edwards	W	901
	Dr. Helen NunnW	A-A	1,187
1983	Norvell Moore	A-A	Unopposed
1986	Dr. Helen Nunn	A-A	Unopposed
1987	Edwin L. Holstead	W	606
	Norvell Moore	A-A	629

1988	Bill Sullivan	W	758
	Curtis "Preacher" Smith	A-A	166
1989	Harold Sudbury, Jr.	W	1,302
	Thurman J. Green, II	A-A	287
	Steve Littrell	W	1,299
	Shirley M. Harvell	A-A	305
	Steward R. Jerome	W	1,226
	Lawrence B. Haley	A-A	374
1990	Steve Littrell	W	810
	Shirley Harvell	A-A	135
	Dr. Helen Nunn	A-A	Unopposed
1991	Karen Sue Fraser	W	927
	Phyllis Bloodworth	W	388
	Hattie G. Middlebrook	A-A	232
	James T. McMahan	W	861
	Doug Wilson	W	484
	Shirley Harvell	A-A	223
1992	Bill Sullivan	W	Unopposed
	Bill Stovell, III	W	456
	Shirley Milliken	A-A	173

App. 32.

REASONS FOR GRANTING THE PETITION

A. Introduction.

From 1975 through 1991, African-Americans were consistently elected to the Board in proportion to their

percentage of the voting age population. Six justices of this Court agreed in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that consistent and sustained proportional representation "is presumptively inconsistent with the existence of a § 2 violation." *Id.*, at 102 (O'Conner, J. concurring); *see Id.*, at 77 ("This persistent proportional representation is inconsistent with [a Section 2 violation]."). Despite sixteen consecutive years of proportional representation, the Eighth Circuit held that the district court's finding that Respondents failed to establish a violation of Section 2 was clearly-erroneous. App. 17; 71 F.3d at 1391. The Eighth Circuit's decision conflicts with this Court's opinion in *Gingles, supra,* and incorrectly applies the clearly-erroneous standard of review. *See, e.g., Anderson v. Bessemer City,* 470 U.S. 564, 573-74 (1985). For these reasons, certiorari should be granted, and the decision of the district court should be affirmed.

B. Section 2 Generally.

Section 2 prohibits any standard, practice or procedure which results in denial or abridgement of the right of any citizen to vote on account of race. 42 U.S.C. § 1973(a). A violation of Section 2 is established if, "based on a totality of the circumstances," the plaintiff proves that members of the plaintiff class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

This Court in *Gingles* identified three "necessary preconditions" to establishing a violation of Section 2. 478 U.S. at 50. First, the minority group must be sufficiently

large and geographically compact to constitute a majority in a single member district. *Id.* Second, the minority group must be politically cohesive. *Id.*, at 51. Third, the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it to "usually defeat the minority's preferred candidate." *Id.*

While proof of the three *Gingles* factors is necessary, it is not sufficient to establish a Section 2 violation. *Johnson v. DeGrandy*, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 775, 791 (1994); *see Growe v. Emison*, 507 U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388, 404 (1993) ("Unless [the three *Gingles* factors] are established, there neither has been a wrong nor can be a remedy."). The ultimate inquiry is whether, based on the totality of the circumstances, the challenged practice results in the minority group having less opportunity to participate in the political process and to elect representatives of their choice. 42 U.S.C. § 1973(b); *DeGrandy*, 129 L.Ed.2d at 792-93. Analysis of the totality of the circumstances is necessary "not only because bloc voting [is] a matter of degree, with a variable legal significance depending on other facts, . . . but also because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id.*, 129 L.Ed.2d at 791.

In examining the totality of the circumstances, this Court has identified a nonexclusive list of nine "typical factors" which "might be probative of a § 2 violation." *Gingles*, 478 U.S. at 36-37. Those factors are (1) the extent of any history of official discrimination; (2) the extent to which voting in the elections of the State or political subdivision has been racially polarized; (3) the extent to

which the State or political subdivision has used voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) the extent to which minority candidates have been excluded from a candidate slating process; (5) the extent to which members of the minority group in the State or political subdivision bear the effects of past discrimination; (6) the extent to which political campaigns have been characterized by overt racial appeals; (7) the extent to which members of the minority group have been elected to public office; (8) the extent to which elected officials have been responsive to the particularized needs of the members of the minority group; and, (9) the extent to which the policy underlying the voting practice being challenged is tenuous. *Id.*

In the present case, the district court found that Respondents failed to establish the third *Gingles* factor, legally significant white bloc voting. The district court also found that Respondents failed to establish that, based on a totality of the circumstances, the at-large system of electing the Board resulted in African-Americans having less opportunity to participate in the political process and to elect representatives of their choice. The district court's findings were not clearly-erroneous and should be affirmed.

C. The Clearly-Erroneous Standard of Review.

This Court held in *Gingles* that "the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." 478 U.S. at 79. In evaluating a Section 2 claim, the district court is:

> to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters. This determination is peculiarly dependent on the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral scheme.

Gingles, 478 U.S. at 79 (internal quotations and citations omitted). Application of the clearly-erroneous standard in Section 2 cases "preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Gingles*, 478 U.S. at 79.

The clearly-erroneous standard "requires the appellate court to uphold any district court determination that falls within the broad range of permissible conclusions." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990). In *Anderson, supra*, this Court explained:

> If a district court's account of the evidence is plausible in light of the record when viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

470 U.S. at 573-74. In the present case, the Eighth Circuit impermissibly substituted its view of the evidence for that of the district court.

The district court's view of the evidence was certainly "plausible" in light of the consistent and sustained

success of African-American candidates. *Anderson*, 470 U.S. at 573-74. In *Gingles*, this Court held that ten years of proportional representation was "presumptively inconsistent" with a Section 2 violation. 478 U.S. at 102 (O'Conner, J. concurring). Sixteen years of proportional representation created the same "presumption" in the present case. This "presumption" should have sufficed to protect the district court's findings from reversal under clearly-erroneous review.

D. Persistent Proportional Representation.

In reversing the district court, the Eighth Circuit concluded that "[t]he proportional representation on which the district court relies rests on infirm ground . . . . No black candidate has won a contested election since the change in the law." App. 12; 71 F.3d at 1389. The "law" referred to by the Eighth Circuit was the majority vote requirement enacted by the Arkansas Legislature in 1987.

1. Arkansas' Majority Vote Requirement.

The Eighth Circuit indicated that it would have affirmed the district court but for Arkansas' majority vote requirement.[4]

The Eighth Circuit stated:

> We emphasize that we are not assessing the validity of the law that existed prior to 1988. It

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[4] In *Whitfield v. Democratic Party of Ark.*, 686 F.Supp. 1365, *aff'd*, 902 F.2d 15 (8th Cir. 1990), the State of Arkansas' majority vote requirement was held not to violate Section 2.

> no longer exists, and its legitimacy is inconsequential. . . . Proportional representation may well have sufficed to protect the former scheme from a Section 2 claim, but the truth of the current system is that minority candidates face substantial impediments to election . . . .

App. 14; 71 F.3d at 1389. Although the majority vote requirement was a factor to consider in the totality of the circumstances, the Eighth Circuit erred in giving it such substantial weight since it had had no impact on any BSD election since it had been in place and would have had no impact on any election since 1982.[5]

Moreover, despite losing all of the contested elections after 1987, African-Americans maintained proportional representation. App. 32. Ignoring this fact leads to results inconsistent with Section 2. If African-Americans had won a proportional number[6] of the contested elections after 1987 through the time of trial (2 of 7), there would have been four African-Americans on the eight member board (50%). As this Court stated in *DeGrandy*, "One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." 129 L.Ed.2d at 794. Therefore, Arkansas' majority vote requirement should have been given little weight in light of the persistent proportional representation.

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[5] The at-large election system challenged in *Gingles* included a majority vote requirement. 478 U.S. at 39.

[6] *See* discussion Section E, *infra*.

2. Unopposed Election of Dr. Nunn.

The Eighth Circuit discounted proportional representation after 1987 because it was maintained by the unopposed election of Dr. Nunn in 1990. The Eighth Circuit erred in ignoring Dr. Nunn's unopposed election in 1990. In 1982 in her first attempt to gain a seat on the Board, Dr. Nunn received 56% of the vote to defeat a white opponent. Dr. Nunn was "the representative of choice of the overwhelming majority of the black community." App. 91; 759 F.Supp. at 527.[7]

Plaintiffs Shirley Harvell and Hattie Middlebrook testified that they supported Dr. Nunn in 1982. Tr. 155-56 and 178. Dr. Nunn also received substantial support from white voters.[8] In precincts with a white VAP greater than 80%, Dr. Nunn received 34% of the vote. Pl. 15 and 26. *Compare Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1148-50 (5th Cir. 1993) (Affirmed finding of no legally significant white bloc voting where African-American candidates won two elections with 58% and 30% of the white vote despite expert testimony that white bloc voting was legally significant and that these elections were aberrational).

Plaintiff Middlebrook conceded that Dr. Nunn was a "very capable board member." Tr. 156. Dr. Nunn received

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[7] Because Dr. Nunn was overwhelmingly supported by African-Americans, there can be no concern that she was a token representative elected by the white majority.

[8] Moore also received substantial support from white voters in defeating a white opponent in 1987. In that election, Moore received 42% of the vote in a 98% white precinct. Pl. 15 and 26.

her doctorate in sociology from Cornell University and did post-doctoral work at Pepperdine University. Tr. 256. Upon returning to Blytheville, she taught in the Blytheville School District for 14 years. Tr. 257. Dr. Nunn sought election to the Board in 1982 after retiring from teaching. Tr. 267.

Imminently qualified and with solid support from both African-American and white voters in 1982, Dr. Nunn was likely considered unbeatable in later elections. As the Second Circuit has stated, "It borders on absurd, of course, to suggest that an individual's success in politics should be discounted as aberrational because the person is qualified and popular." *See NAACP v. City of Niagra Falls*, 65 F.3d 1002, 1021 n.22 (2nd Cir. 1995). Likewise, Dr. Nunn's election in 1990 should not have been discounted because her popularity discouraged opposition.[9]

Although Dr. Nunn was unopposed in 1990, her election cannot be considered the result of "special circumstances." *See Gingles*, 478 U.S. at 55-56. Special circumstances exist when a candidate's success "does not accurately reflect the minority group's ability to elect its preferred representative[ ]." *Gingles*, 478 U.S. at 77. Dr. Nunn ran unopposed because of her ability to get elected, not in spite of it.

Therefore, Arkansas' majority vote requirement and Dr. Nunn's election without opposition provided no basis for discounting sixteen years of proportional representation. The Eighth Circuit erred in failing to give decisive

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[9] The same is true for her unopposed election in 1986.

weight to the consistent and sustained success enjoyed by African-Americans in BSD elections.

E. Legally Significant White Bloc Voting.

The consistent and sustained success enjoyed by African-American candidates in BSD also provided substantial evidence to support the district court's finding that Respondents failed to establish legally significant white bloc voting. *See Gingles,* 478 U.S. at 55-56. Respondents were required to establish "that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances such as the minority candidate running unopposed, [citations omitted], – usually to defeat the minority's preferred candidate." *Id.*, 478 U.S. at 51; *See also Id.*, 478 U.S. at 56 (defining legally significant white bloc voting as "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes . . . "). As this Court has explained, it is the "usual predictability of the majority success [that] distinguishes structural dilution from the mere loss of an occasional election." *Id.*, at 51.

To determine whether white bloc voting is legally significant, "a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidate under an acceptable system." *Id.*, at 88 (O'Conner J., concurring). Where African-Americans are geographically compact and politically cohesive, the appropriate benchmark is the African-American VAP. *See Holder v. Hall,* 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 687, 700 (1994) (O'Conner, J. concurring) ("In a challenge to a multimember at-large system, for example, a court may

compare it to a system of multiple single-member districts."); *DeGrandy*, 129 L.Ed.2d at 794 ("Failure to maximize cannot be the measure of § 2."). African-Americans constitute 28.9% of the BSD voting age population, and therefore, candidates preferred by African-Americans should "normally" win roughly one in every four elections (25%). Since 1974, African-Americans have prevailed in 9 of 18 BSD elections (50%).[10] Excluding elections in which an African-American ran unopposed, African-Americans have won 4 of 13 BSD elections (30%) since 1974. Hence, even excluding instances where African-American's ran unopposed, African-Americans have been elected proportionally since 1974. App. 32.

1. Polarized Voting Distinguished.

The Eighth Circuit erred in equating polarized voting with legally significant white bloc voting. App. 8; 71 F.3d at 1382. The Eighth Circuit held that "[i]n the face of the finding of consistent polarization, a legally significant white cross-over vote does not exist under the current election scheme." App. 8; 71 F.3d at 1387. While polarized voting is necessary to establish legally significant white bloc voting, *see Voinovich v. Quilter*, 507 U.S. ___, 113 S.Ct. 1149, 122 L.Ed.2d 500, 514 (1993), evidence of racially polarized voting standing alone does not establish legally

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[10] Respondents presented no evidence with regard to BSD elections which involved only white candidates. Courts have recognized such elections are relevant to the question of whether candidates preferred by African-Americans have been elected. *See, e.g., NAACP v. City of Niagra Falls*, 65 F.3d 1002, 1016 (2nd Cir. 1995).

significant white bloc voting. As this Court stated in *DeGrandy*, "bloc voting [is] a matter of degree, with a variable legal significance based on other facts . . . . " 129 L.Ed.2d at 791. *See Gingles*, 478 U.S. at 57-58 ("[T]he degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances.").

Assume a hypothetical voting jurisdiction of 1000 voters with an African-American VAP of 10% where a white candidate is running against an African-American candidate. If only 56% of the white voters vote as a bloc for the white candidate, the white candidate is assured success. However assume the African-American VAP is increased to 30%. Under that scenario, 72% of the white voters must vote as a bloc for the white candidate to assure the white candidate's success. On the contrary, if there exists a consistent 30% white crossover vote, candidates preferred by African-Americans can easily be elected.

In the present case, the district court found that "voting in the School District is racially polarized in that usually the majority of black voters vote for black candidates and the majority of white voters vote for white candidates."[11] Even so, the district court found that

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[11] Respondents' "expert" at trial, Jim Lynch, had no background in statistics and struggled to explain statistical data which computer software had allowed him to produce. The dissenting Eighth Circuit justices noted, "It was doubtful that his statistical analysis and opinions were even admissible under Fed. R. Civ. P. 702." App. 20; 71 F.3d at 1392. The dissent further noted that, "Lynch did not perform an extreme case analysis or

Respondents failed to establish legally significant white bloc voting. App. 91; 759 F.Supp. at 528. The Eighth Circuit erred in treating these findings as inconsistent. App. 8; 71 F.3d at 1387. As the BSD election results demonstrate, candidates preferred by African-Americans can be successful despite some degree of racially polarized voting. App. 32.

African-American candidates can and do receive support from white voters in BSD.[12] In fact, white support for African-American candidates appeared to track that of African-Americans. While Dr. Nunn and Moore received significant white support and overwhelming African-American support, the unsuccessful African-American candidates after 1987 received little support from either group. Pl. 14 and 26. This suggests that white voters rejected these candidates for reasons other than race. *See Gingles*, 478 U.S. at 79 (O'Conner J., concurring) ("Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another

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a complete bivariate ecological regression analysis, methods the Supreme Court notes are 'standard in the literature for the analysis of racially polarized voting.' " *Id.* As a result Lynch could not determine the percentage of white voters which supported African-American candidates. With regard to the statistical analysis he did perform, Lynch testified, "I'm not explaining votes." Tr. 60.

[12] *See* discussion Section D(2), *supra*.

candidate, equally preferred by the minority group, might be able to attract greater white support in future elections.").[13] Therefore, Respondents failed to establish a white bloc vote that will normally defeat African-Americans' preferred candidates. *See Gingles*, 478 U.S. at 55-56.

2. African-Americans' Preferred Candidates.

The district court also found that Respondents failed to establish that the unsuccessful African-American candidates after 1987 were the *preferred* candidates of the African-American community. App. 72. In making this finding, the district court noted the remarkably low number of votes received by these candidates and testimony that at least two of the candidates were thought of in the community as "militant." Tr. 153 and 173. The district court's finding was not clearly-erroneous.

There was a dramatic drop in the number of votes for African-American candidates after the election of Moore in 1987. Prior to 1988, African-American candidates received an average of 977 votes. In comparison, white candidates received an average of 1264[14] votes, a difference of only 287 votes or 12%. After 1987, the average number of votes received by African-American candidates was 237, as compared to 1064 for white candidates.

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[13] In 1982, Lester lost by only 159 votes. Lester's loss indicated that some of the same voters that voted for Dr. Nunn did not vote for Lester, and thus, a factor other than race was important to Dr. Nunn's election and Lester's loss. In fact, Lester was "gravely ill" at the time of the election. Tr. 262.

[14] Where more than one white candidate ran during a year, the votes cast for all white candidates were totalled.

Thus, support for African-American candidates dropped 76% after 1987 while support for white candidates dropped only 16%. App. 32.

If the unsuccessful African-American candidates since 1987 had received as many votes as Dr. Nunn received the first time she ran in 1982, three would have won. App. 32. One of the three, Bill Smith in 1988, received only 42% of the vote in a precinct with an African-American VAP of over 80%. Pl. 14 and 26. Similarly, while in 1982 Dr. Nunn received 788 votes from the three voting precincts with the greatest African-American VAP, Harvell received only 97 votes in the three voting precincts with the greatest African-American VAP in 1990.[15] Pl. 14 and 26. In that same race, she received only 7 of 69 votes (10%) in a precinct with 40% African-American VAP. Pl. Ex. 26.[16]

Although the Eighth Circuit recognized that "[t]he preferences of the minority voters must be established on an election-specific basis, viewing all the relevant circumstances," App. 6, 71 F.3d at 1386, it found that Respondents met their burden with general proof concerning polarized voting. App. 7; 71 F.3d at 1386-87. Rather than

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[15] The Eighth Circuit in a footnote makes reference to the fact that the polling place for a majority African-American precinct was moved in 1990. App. 10; 71 F.3d at 1388 n.5. The former polling place was owned by the newly elected chairman of the Mississippi County Election Commission, and the polling place was moved from his building to avoid the appearance of impropriety. Tr. 175.

[16] Plaintiffs' Exhibit 14 erroneously indicates that Harvell received 60% of the vote in this precinct, rather than the 10% which she actually received. Pl. 26.

considering the African-American community as a whole, the Eighth Circuit looked only to African-Americans who actually cast a vote. App. 7; 71 F.3d at 1386. Under the Eighth Circuit's approach, as long as a candidate received a majority of the African-American vote, the candidate was the preferred candidate of the African-American community. *Compare Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (African-American plaintiffs argued that an African-American Republican winner of at-large election was not the preferred candidate of African-Americans).

The Eighth Circuit's approach fails to recognize that a decision not to vote can be just as indicative of a voter's preference as the decision for whom to vote. *See Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988) (district court properly inferred that white candidates were not preferred candidates of minority group where voter turnout increased dramatically when there was a candidate who was a member of the minority group). This is particularly true where voters are racially polarized. If African-American voters refuse to vote for white candidates simply because they are white, their only option is not to vote at all rather than vote for African-American candidates that they dislike.[17]

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[17] Assume that African-American voters boycott an election between a white candidate and an African-American candidate because of dissatisfaction with both candidates. However, one African-American voter votes and votes for the African-American candidate. Under the Eighth Circuit's approach, the candidate is the preferred candidate of African-Americans, and the boycott is irrelevant. Such a result is inconsistent with the Voting Rights Act. *See* App. 55; 33 F.3d at

In the present case, the average number of votes received by African-American candidates after 1987 was 237. This represents only 5% of the total African-American VAP and only 30% of the Dr. Nunn's 1982 vote total. The most votes received by an African-American candidate after 1987 was 374 by Haley in 1989. This represents only 8% of the total African-American VAP.[18] Pl. 26; Def. 6. The dramatic drop in the number of votes for African-American candidates after 1987 provides substantial evidence of the African-American community's dissatisfaction with these candidates. *See Campos*, 840 F.2d at 1245.

In rejecting the district court's analysis, the Eighth Circuit stated, "There are a number of factors . . . that indicate that the district court's reliance on low turnout is too speculative." App. 9; 71 F.3d at 1388. None of the factors discussed by the Eighth Circuit support its contention. First, the Eighth Circuit stated, "Low voter turnout can be explained by a number of socio-economic factors, or may be explained by unabashed voter apathy." App. 9; 71 F.3d at 1388. The record is devoid of any evidence to support this finding. Moreover, while socio-economic factors and apathy could possibly explain consistently low voter turnout, they cannot explain a 78% *reduction* in the number of votes received by African-

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918 (Loken, J. dissenting) ("[T]he Voting Rights Act is intended to alleviate minority vote dilution, not candidate unpopularity.").

[18] Even if the unsuccessful African-American candidates after 1987 had been seeking election in majority African-American single member zones, the African-American support for those candidates was so small that they could easily have been defeated by a minority white candidate.

American candidates over a period of time when the socioeconomic factors were unchanged.

The Eighth Circuit next suggested that the majority vote requirement may account for the dramatic drop in support for African-American candidates. The evidence negated this as a possibility. Six of the eight races after 1987 involved only two candidates, and thus, the majority vote requirement was irrelevant in these six races. Moreover, in the last two head-to-head elections between an African-American and a white before the majority vote requirement went into effect, the African-American prevailed. App. 32. Thus, the State of Arkansas' majority vote requirement gave African-Americans in BSD no reason to become apathetic after 1987.

Finally, the Eighth Circuit stated that there was "no evidence" that the unsuccessful African-American candidates after 1987 were "militant fringe candidates." On the contrary, Harvell, an unsuccessful African-American candidate in 1989, 1990, and 1991, and Middlebrook, an unsuccessful African-American candidate in 1991, both testified at trial that others in the community considered them to be "militant." Tr. 153 and 173.[19] In any event, Petitioners were not required to explain why African-Americans were dissatisfied with these candidates. As the Eighth Circuit recognized (but failed to apply), the burden was on Respondents to establish each as the preferred candidate of the African-American community.

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[19] Harvell further testified that she was considered a "troublemaker, radical," Tr. 177 and 182, and that parents considered her "ineffective" in protecting the interest of their children. Tr. 165.

App. 6; 731 F.3d at 1386. The district court's finding that Respondents failed to meet this burden was not clearly-erroneous.

F. Totality of the Circumstances.

Finally, the district court found that, based on a totality of the circumstances, Respondents failed to establish that the at-large system of electing the Board resulted in African-Americans having less opportunity to participate in the political process and to elect representatives of their choice. App. 95; 759 F.Supp. at 529. *See* 42 U.S.C. § 1973(b). Of the factors to be considered in the totality inquiry, most have been discussed above. With regard to the remaining factors, the Eighth Circuit erred in two respects.

1. Socioeconomic Factors.

First, Respondents relied on socioeconomic data to establish that they had less opportunity to participate in the political process.[20] *See Chisom v. Roemer*, 501 U.S. ___,

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[20] As one court has noted, "Because there are no legal barriers remaining to the opportunity for blacks to participate in the political process, plaintiffs have naturally emphasized the 'socioeconomic' factors." *Whitfield*, 686 F.Supp. at 1384; *see Turner v. State of Arkansas*, 784 F.Supp. 553, 577, *aff'd* 504 U.S. 952 (1992) ("There are no presently existing legal barriers to voting by black citizens in Arkansas, and therefore they have just as much opportunity to participate in the political process as anyone else."), quoting *Jeffers v. Clinton*, 740 F.Supp. 196, 204 (E.D.Ark. 1989); *Leadership Roundtable v. City of Little Rock*, 499 F.Supp. 579, 584 (E.D.Ark. 1980) ("Since 1965, there has been no legal impediment in Arkansas to voting by blacks.").

111 S.Ct. ___, 115 L.Ed.2d 348, 364 (1991) ("[T]he inability to elect representatives of their choice is not sufficient to establish a [Section 2] violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process."); *see also DeGrandy*, 129 L.Ed.2d at 791 ("Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of the circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes."). This data indicated generally that African-Americans were poorer and less educated than whites.

Respondents contend that super-majority African-American zones are required to overcome low voter turnout among African-Americans arising from their depressed socioeconomic status. However, Respondents presented no evidence specifically on the issue of voter turnout. In fact, the BSD election results indicated that African-Americans turn out in greater numbers than whites to support candidates preferred by the African-American community as a whole.[21] In 1982 Dr. Nunn received 95% of the votes in a precinct with a 60% white VAP. Pl. 14 and 26. In that same election, the three precincts with an African-American VAP over 40% were among the four precincts in which the greatest number of

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[21] The average school district election can be won with approximately 1000 votes. App. 32. There are 4584 African-American voters in BSD. Tr. 96. Thus, African-American candidates can easily win without any support from white voters provided they turn out in substantially greater numbers than whites.

votes were cast. Similarly, in 1987 Moore received more than 40% of the vote in two precincts with a greater than 97% white VAP. Pl. 14 and 26. Assuming racially polarized voting, the above results can only be explained by greater voter turnout among African-Americans.[22] Therefore, Respondents failed to establish that the at-large voting system for electing the Board resulted in African-Americans having less opportunity to participate in the political process, and consequently, their Section 2 claim must fail. *See Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994) ("When, in the competition inherent in the democratic process, a racial group's preferred candidates are defeated despite the ability of its members to participate fully in that process, the Voting Rights Act should not provide that group with a remedy which is unavailable to other supporters of defeated candidates.").

2. Policy Underlying an At-Large System.

Second, the Eighth Circuit erred in failing to consider the legitimate purpose underlying BSD's at-large system. Dr. Nunn testified that she opposed single member 9districts "[b]ecause I have spent my life working with the total community, working together, and I think that's one way to improve the quality of education." Tr. 276. Accordingly, the district court found that BSD's at-large election system had a "legitimate purpose":

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[22] At this point in the Section 2 analysis, it is presumed that Respondents have established racially polarized voting; otherwise, there would be no need to assess the totality of the circumstances. *See Voinovich*, 122 L.Ed.2d at 514.

> It offers the obvious advantage of ease in application and prevents divisive arguments and concerns that can be raised between elected officials who represent a defined number of persons in a single election district. Potential disputes between different election districts are avoided. Further, it allows all persons in all corners of the district to vote for several candidates rather than limiting their voice to one member who would represent the interest of a limited number of people. Finally, and perhaps most importantly, it prevents the possibility of the school board itself becoming racially polarized from the members[] efforts to represent the interest of their predominately black or white districts . . . .

App. 75. In contrast, creation of majority-minority districts has been described by this Court as the "politics of second best." *DeGrandy*, 129 L.Ed.2d at 796; *see Shaw v. Reno*, 509 U.S. ___, ___, 113 S.Ct. ___, 125 L.Ed.2d 511, 535 (1993) ("Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire."). The Eighth Circuit failed to give sufficient weight to the legitimate purpose underlying BSD's at-large system.

Despite its advantages, no at-large system can survive a Section 2 challenge under the standard applied by the Eighth Circuit. In finding BSD's at-large system to violate Section 2, the Eighth Circuit concluded:

> [A]ny minority serving on the board does so at the sufferance of the majority – hallow proportional representation indeed when the minority must rely on majority benevolence[23] to ensure the adequacy of its representation. A system that works for minorities only in the absence of white opposition is a system that fails to operate in accord with the law.

App. 14; 71 F.3d at 1389-90. It is an inherent part of being a political minority that, absent "special circumstances," the minority's preferred candidate can be elected only if he receives some degree of majority support. In effect, the Eighth Circuit holds at-large systems to be per se violative of Section 2. This holding directly conflicts with this Court's opinion in *Gingles* and necessitates reversal. 478 U.S. at 48 (at-large election systems are not "per se violative of minority voters' rights."). Section 2 does not guarantee election of African-American candidates without support from white voters. *See DeGrandy*, 129 L.Ed.2d at 796 ("[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.").

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[23] By "majority benevolence," the Eighth Circuit must mean majority votes.

CONCLUSION

In *Gingles*, six justices agreed that six elections resulting in ten years of proportional representation was "presumptively inconsistent" with a Section 2 violation. *See* 478 U.S. at 104 (O'Conner, J. concurring). Following *Gingles*, the district court found that Respondents failed to establish that the at-large system of electing the Board violated Section 2 where for sixteen years up to and including the time of trial African-Americans were represented on the Board roughly in proportion to their percentage of the voting age population. The Eighth Circuit's opinion reversing the district court conflicts with this Court's opinion in *Gingles* and erroneously substitutes its view of the evidence for that of the district court in violation of the clearly-erroneous standard of review. For these reasons, certiorari should be granted, and the decision of the district court should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1009

Shirley M. Harvell; Emmanuel Lofton, Reverend; Hattie Middlebrook; Mary Alice Jones; Jacquelin Henton,

Appellants,

v.

Blytheville School District #5, A Public Body Corporate; William Tomlinson, Individually and as Board Member; Norvell Moore, Individually and as Board Member; William Sullivan, Individually and as Board Member; Harold Sudbury, Jr., Individually and as Board Member; Helen Nunn, Individually and as Board Member; Karen Fraser, Individually and as Board Member; Steve Littrell, Individually and as Board Member; William Stovall, III, also known as Bill Stovell, Individually and Board Member; Blytheville School District #5, Board of Directors; Dr. Frank Ladd, Individually and in his official capacity as Superintendent of Blytheville School District No. 5,

Appellees.

* Appeal from the United States District Court for the Eastern District of Arkansas.

Submitted: April 13, 1995
Filed: December 5, 1995

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, MORRIS SHEPPARD ARNOLD, and MURPHY, Circuit Judges, En Banc.

WOLLMAN, Circuit Judge.

Shirley Harvell and other voters filed suit in 1989, challenging the election procedure for school board members in the Blytheville, Arkansas, school district as violative of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("VRA"). The district court dismissed the complaint, finding that Harvell failed to set forth a prima facie violation of Section 2. *Harvell v. Ladd*, 759 F. Supp. 525, 529-30 (E.D. Ark. 1991). We reversed and remanded to the district court for further findings concerning the factors set forth in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986). *Harvell v. Ladd*, 958 F.2d 226, 230 (8th Cir. 1992). On remand, the district court again dismissed the complaint because it found that Harvell failed to establish that the unsuccessful black candidates were the minority's preferred candidates. We again reversed in part the district court's subsequent decision following remand, but affirmed its denial of sanctions against Harvell. *Harvell v. Blytheville Sch. Dist. #5*, 33 F.3d 910 (8th Cir. 1994). We subsequently agreed to rehear the case en banc and vacated the panel opinion. We now reverse the decision

of the district court in part and affirm the denial of sanctions.

I.

The underlying facts of this dispute are set out in detail in our earlier opinions. The voting age population of the Blytheville school district is 14,500, of which 70% is white and 29% black.[1] Each member of the eight member at-large school board serves a four-year term, and two terms expire each year. Historically, school board elections were determined by a plurality vote. In 1987, however, the Arkansas legislature altered the voting scheme for school board elections from one of plurality to one of majority, which would occasion the need for a run-off election between the voter-preferred candidates in the event that no candidate was able to garnish a majority of the voters in the initial election. Ark. Code. Ann. § 6-14-121. All winning candidates since 1987 have been elected by a majority of votes cast in the first round. Following two elections under this scheme Harvell filed suit. None of six separate black candidates has defeated a white candidate in eight attempts following the 1987 election, although Dr. Helen Nunn was reseated without opposition in 1990.[2]

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[1] These are the 1980 census figures that were used at trial. According to the 1990 census, the Blytheville school district has a total population of 23,057, of which approximately 37% are black and 62% white, but we do not have the relevant voting age populations before us.

[2] Appendix I contains the vote breakdown by candidate for each election in which a black candidate has run.

II.

To mount a successful challenge to multi-member districts under Section 2,[3] a plaintiff must initially satisfy the three preconditions delineated in *Gingles*. These preconditions are 1) that the minority group is large enough and geographically compact enough that it would be a majority in a single-member district; 2) that the minority group is politically cohesive; and 3) that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. 478 U.S. at 50-51. *Gingles* also set forth nine non-exclusive factors mentioned in the Senate report accompanying the VRA to assist in determining whether, under the totality of the circumstances, a challenged electoral scheme dilutes the minority vote. These include (1) the history of voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the state or subdivision is racially polarized; (3) the extent to which the state or subdivision has used voting practices or procedures that tend to enhance opportunities for discrimination against the minority group; (4) whether minority candidates have been denied access to any candidate-slating process; (5) the extent to which minorities have borne the effects of past discrimination in relation to education, employment, and health; (6) whether local political campaigns have used overt or subtle racial appeals; (7) the extent to which minority

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[3] This vote dilution claim is "analytically distinct" from a challenge to voting districts on equal protection grounds. *Miller v. Johnson*, 115 S. Ct. 2475, 2485 (1995) (*quoting Shaw v. Reno*, 113 S. Ct. 2816, 2830 (1993)).

group members have been elected to public office in the jurisdiction; (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the minority group; and (9) whether the policy underlying the use of voting qualifications is tenuous. 478 U.S. at 36-37.

We must analyze the elements of a Section 2 case in context, according deference to the district court where necessary and applying legal constructs where appropriate. The district court's findings regarding the factual context giving rise to the claim are reviewed for clear error. *See Gingles*, 478 U.S. at 78-79. But the legal conclusions it employs, "including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law," are subject to plenary review. *Id.* at 79 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).

The district court found that Harvell established the first two *Gingles* preconditions at trial. The school district does not contest these findings of geographic compactness and political cohesiveness. We therefore accept them as established. The district court also found that voting in the school board elections is racially polarized. *Harvell*, 759 F. Supp. at 527-28. This undisputed finding is borne out by the record and weighs heavily in favor of finding the third *Gingles* precondition established. *Jeffers v. Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989) (three-judge court), *aff'd mem.*, 498 U.S. 1019 (1991); *Smith v. Clinton*, 687 F. Supp. 1310, 1314-15 (E.D. Ark. 1988) (three-judge court) *see Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987) (existence of polarization establishes the power

of white bloc voting). The district court found, however, and the school district contends, that the low voter turnout sufficiently indicates that the minority candidates in the elections from 1988 to 1992 were not preferred by the minority voters and precluded Harvell from satisfying the third *Gingles* precondition. Harvell asserts, and we agree, that the district court misapprehended the definition of who is eligible for "minority-preferred candidate" status and that the evidence establishes that the candidates in those elections were in fact the minority-preferred candidates.

We do not categorically state that a candidate is the minority-preferred candidate simply because that candidate is a member of the minority. Such stereotyping runs afoul of the principles embodied in the Equal Protection Clause. *See Miller,* 115 S. Ct. at 2486 (state assignment of voters on basis of racial assumptions is "offensive and demeaning"). *But see Jenkins v. Red Clay Consol. Sch. Dist Bd. of Educ.,* 4 F.3d 1103, 1126 (3d Cir. 1993) (stating that "practical experience leads to the inference that any particular minority candidate is minority-preferred"), *cert. denied,* 114 S. Ct. 2779 (1994). Accordingly, such an inference is insufficient to establish that any particular candidate is minority-preferred. The preferences of the minority voters must be established on an election-specific basis, viewing all the relevant circumstances. *See Jenkins,* 4 F.3d at 1126.

The record makes clear in this case that the race of a candidate is by far the determinative factor in minority voting patterns in Blytheville school board elections. Harvell's regression analysis strongly supports the conclusion that those black candidates who did run in the

elections from 1988-1992 were in fact the minority-preferred candidates.[4] *See id.* (inference derived from candidate's race combined with statistical evidence of voting patterns is sufficient to establish minority preference); *Clarke v. City of Cincinnati*, 40 F.3d 807, 810 n.1 (6th Cir. 1994) ("[C]ourts generally have understood blacks' preferred candidates simply to be those candidates who receive the greatest support from black voters."), *cert. denied*, 115 S. Ct. 1960 (1995); *see also Jeffers*, 730 F. Supp. at 208 (noting race-conscious voting behavior of Arkansans). The school district does not contest this statistical evidence and offers no other evidence to contradict the statistical preference. The consistency of the data over time lends additional support to this conclusion. *Gingles*, 478 U.S. at 57.

There may be situations in which voter apathy may be linked to disapproval of a particular candidate, but there is no indication that such is the case here. The silence of the minority voters is not so deafening as to warrant a finding that they disapproved of six different minority candidates in light of the uncontroverted statistical evidence that supports a finding of overwhelming support from those blacks who did vote. Nor are the numbers so low as to reduce their statistical significance to a nullity. Speculation regarding reasons for low minority turnout is inappropriate. *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415-16 (9th Cir. 1988) (looking at actual voting patterns to determine political cohesion rather than turnout rates), *cert. denied*, 489 U.S. 1080 (1989). The

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[4] Appendix II contains the results of Harvell's expert statistical evidence.

school district's interpretation of the low turnout underestimates the legal significance of the years of polarized voting evident in the Blytheville school board elections. *See Gingles*, 478 U.S. at 57; *see also Clark v. Calhoun County*, 21 F.3d 92, 96 (5th Cir. 1994) (ability of majority to defeat the minority-preferred candidate is "ordinarily established through evidence of racially polarized voting"). Similarly, the related natures of cohesiveness, polarization, and bloc voting demonstrate the incongruity of any reliance on low voter turnout in this case. *See Clark*, 21 F.3d at 96; *Jenkins*, 4 F.3d at 1133 n.32 (discussing relation between political cohesiveness and the minority-preferred candidate); *Collins v. City of Norfolk*, 883 F.2d 1232, 1237 (4th Cir. 1989) (polarization relevant to determination of cohesiveness and whether white bloc voting defeats minority-preferred candidates); *Collins*, 816 F.2d at 935 ("[T]he existence of racially polarized voting . . . establishes both cohesiveness of the minority group and the power of white bloc voting to defeat the minority's candidates.") (emphasis omitted); *see also Gingles*, 478 U.S. at 52 n.18 (noting interchangeable use of polarization and bloc voting); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 (11th Cir.) ("The surest indication of race-conscious politics is a pattern of racially polarized voting."), *cert. denied*, 469 U.S. 976 (1984). The fact that black candidates have lost universally in contested post-1987 elections cannot be explained away simply on the basis of the black electorate's dissatisfaction with its candidates. In the face of the finding of consistent polarization, a legally significant white crossover vote does not exist under the current election scheme. *Cf. Cane v. Worcester County*, 35 F.3d 921, 926 (4th

Cir. 1994) (finding average 19% white crossover vote insufficient to salvage at-large, one-on-one election scheme under the facts of that case), *cert. denied*, 115 S. Ct. 1097 (1995).

That some minority-preferred candidates did achieve electoral success under the old system does not necessitate a finding that those minority candidates who do not now succeed are not the minority's preferred candidates, particularly when no candidates in these elections received greater minority voter support. Moreover, we should not require as a condition to a finding of minority-preferred status heroic, mythic qualities of candidacy better suited to a romantic view of the electoral process than to the rough-and-tumble world of contested elections. Much as the relevant population is the population able to vote, *see African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.2d 1345, 1352 (8th Cir. 1995), the relevant candidate should generally be one able to receive those votes, not some idealized figure whose absence from the ballot keeps a disappointed electorate at home. Under the school district's proffered view, the black voters of Blytheville have gone five consecutive years, six candidates, and eight campaigns without stating a preference, a proposition we cannot accept.

There are a number of factors in addition to the statistical data that indicate that the district court's reliance on low turnout is too speculative. Low voter turnout can be explained by any number of socio-economic factors, or may be explained by unabashed voter apathy. It does not, however, lend itself so easily to an inference of a sub silentio predisposition against any

particular minority candidate. Not only were the minority turnouts low, but voter turnout as a whole for these elections has been historically low. Additionally, we note that following the change in the law the average vote totals declined for both white and minority candidates, although much more precipitously for black candidates. In light of the fact that low voter turnout has often been considered the result of the minority's inability to effectively participate in the political process, *see Gomez*, 863 F.2d at 1416 n.4; *United States v. Dallas County Comm'n*, 739 F.2d 1529, 1538 (11th Cir. 1984), it stands to reason that when an external stimulus dampens the white turnout it may impact even more greatly on a group that has faced historic disadvantages.[5]

Similarly, black voters need have only looked at their plurality successes in 1974 and 1975 to realize that they faced a much lower possibility of success under the present scheme. This may also account for the lower turnout. Finally, varying election dates, the number of seats up for election, and the presence or absence of other ballot issues that may draw the electorate to the polls also have an impact on turnout. Such considerations have no bearing on whether the candidates who ran were or were not

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[5] We further note that in 1990 the polling place of a precinct known as a historic black voter stronghold was moved to a predominantly white area. Although there is no evidence that this move was predicated on an attempt to suppress the black vote, our inquiry looks to the effect of voting practices on equal political opportunity rather than to their intent, *see Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991); *Jeffers*, 730 F. Supp. at 203-04, and the 1990 election produced a record low black voter turnout for that particular precinct.

the minority-preferred candidates. Indeed, there are so many possibilities for explaining the low turnouts that selecting any one in this case is purely impermissible speculation.

Nor can we accept the school district's attempts to characterize the unsuccessful candidates as militant fringe candidates who disenfranchised themselves from the black community. There is no evidence in the record that the minority community viewed any of the six different candidates as in any way inadequate representatives of its interests. In the absence of any such evidence, the countervailing voting patterns conclusively rebut these denigrations.

The school district relies heavily on the historical fact of proportional or near proportional representation of the black population on the school board as evidence of the election scheme's validity. At the outset we note that proportional representation is an important factor to consider in evaluating the validity of an electoral process. It is not, however, the statutory touchstone, and does not provide an absolute safe harbor in which a defendant can seek refuge from the totality of the circumstances. *See Johnson v. De Grandy*, 114 S. Ct. 2647, 2660-61 (1994);[6]

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[6] *De Grandy* resolved a claim involving "proportionality," which "links the number of majority-minority voting districts to minority members' share of the relevant population." 114 S. Ct. at 2658 n.11. Here, because we address a claim involving a single at-large district, the analyses between proportionality and proportional representation are essentially the same. *Cf. Villa*, 54 F.3d at 1352-53 n.10 (distinguishing proportional representation in case involving proportionality claim and single-member districts).

Barnett v. Daley, 32 F.3d 1196, 1202 (7th Cir. 1994); *see also Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (listing possible explanation for success at the polls despite vote dilution), *aff'd sub nom., East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976). Just as proportional representation is not mandated under Section 2, it also does not preclude finding a violation, because racial reference points do not necessarily reflect political realities. *See De Grandy*, 114 S. Ct. at 2661-62 & n.17 (probative value of proportionality varies with the facts). Similarly, the white majority has no right under Section 2 to ensure that a minority group has absolutely no opportunity to achieve greater than proportional representation in any given race.

The proportional representation on which the school district relies rests on infirm ground. The electoral success that black candidates achieved under the plurality system is no longer present. No black candidate has won a contested election since the change in the law. The district contends that none of those candidates would have won under a plurality system either, thus proving that the majority vote requirement is not to blame, and further requiring us to weigh heavily the historic successes of black candidates in rejecting Harvell's complaints. This sort of back-to-the-futurism on the part of the school district cannot withstand analysis, for if we control the results of the elections prior to 1988 with the majority vote requirement, it becomes plain that no proportional representation would have occurred in the past. Both the 1974 and 1975 elections would have gone to white candidates under this scenario; thus, Norvell Moore would have never won initially to enable him to

serve multiple terms as a mostly unopposed incumbent. Dr. Nunn's 1982 victory would have provided the only successful black candidate in Blytheville history had the current scheme been in place then. Such success does not indicate substantial minority voting strength, nor does it indicate the presence of a consistent, legally significant white cross-over vote.

Further, even accepting the historical effects of the plurality element, most of the elections won by black candidates were done so as incumbents in the face of no opposition. This is precisely the type of special circumstance recognized in *Gingles* as not vitiating any element of the claim. 478 U.S. at 51. Even in an extreme case of total vote dilution a candidate running in the face of no opposition is ensured success. The two instances in which a black candidate beat a white candidate head-to-head involved Moore's 23-vote victory as a three-term incumbent[7] against a candidate who was not even the white majority's preference as a previous candidate, and Dr. Nunn's election in 1982. So in the final analysis, when those campaigns involving readily apparent special circumstances are removed, black candidates still have won only one election in thirteen attempts since 1969, fitting precisely in the *Gingles* test as to whether the white majority does indeed vote "sufficiently as a bloc to enable

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[7] We agree that incumbency is the least "special" of the special circumstances, *compare Clarke*, 40 F.3d at 813-14 (de-emphasizing incumbency element) *with Collins*, 883 F.2d at 1243 (emphasizing the importance of incumbency), but accept its potential as such and view this election as a special circumstance because of the multiple incumbency, board composition, and opposition involved.

it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

We emphasize that we are not assessing the validity of the law that existed prior to 1988. It no longer exists, and its legitimacy is inconsequential. The election results under that scheme and the type of representation they yielded, however, are relevant to our inquiry to the extent that the past political reality sheds light on the totality of the circumstances of the present scheme. Proportional representation may well have sufficed to protect the former scheme from a Section 2 claim, but the truth of the current system is that minority candidates face substantial impediments to election[8] that are too stark for us to dismiss their attendant results as mere happenstance. It is a system that allows only for victory of majority-preferred minority candidates. In essence, any minority serving on the board does so at the sufferance of the majority – a hollow proportional representation indeed when the minority must rely on majority benevolence to ensure the adequacy of its representation. A system that works for minorities only in the absence of white opposition is a system that fails to operate in accord with the law.

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[8] In its petition for rehearing the district pointed out that another black person has been appointed to the school board, once again bringing representation into proportion with the black population. This appointment is irrelevant to the ability of black voters to elect the representatives of their choice. Nor does his unopposed reseating in 1993 convince us of the soundness of the election scheme.

Satisfaction of the necessary[9] *Gingles* preconditions carries a plaintiff a long way towards showing a Section 2 violation, *Jenkins*, 4 F.3d at 1116 n.6, 1135; *see Clark*, 21 F.3d at 97, but in the final analysis Harvell must still show that the challenged electoral scheme provides minority voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The totality of the circumstances on the record before us establishes that dilution. *See Gomez*, 863 F.2d at 1411 (remand not necessary when the record "permits only one resolution of the factual issue" (quoting *Pulman-Standard v. Swint*, 456 U.S. 273, 287 [sic; 292] (1982))).

The two primary factors considered in our totality analysis are the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme. *Gingles*, 478 U.S. at 48-49 n.15. As we have discussed, voting practices in the school board elections are highly polarized. There also has been only minimal electoral success under the present scheme, with Dr. Nunn's unopposed reseating as an incumbent in 1990 representing the only minority victory in nine attempts.

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[9] The Supreme Court hedged slightly on this notion in *De Grandy*, at one point calling the preconditions "generally necessary." 114 S. Ct. at 2657. The preeminence of these preconditions in the totality analysis has consistently been recognized in recent opinions by the Supreme Court, however, *see Voinovich v. Quilter*, 113 S. Ct. 1149, 1157-58 (1993); *Growe v. Emison*, 113 S. Ct. 1075, 1083-85 (1993), and we continue to accord them their deserved primacy.

The remaining totality factors, although not essential to Harvell's claim, *see id.*, support our conclusion that Harvell has identified a Section 2 violation. No one party to the litigation denies the long history of racial discrimination in the electoral process in Arkansas. *See Perkins v. City of West Helena*, 675 F.2d 201, 211 (8th Cir.), *aff'd mem.*, 459 U.S. 801 (1982). It is true, as noted by the district court, that strides have been made since the dawn of the civil rights movement, but Arkansas remains by no means idyllic for black voters. *Jeffers*, 730 F. Supp at 204. We conclude that the district court did not accord sufficient weight to the vestiges of that history. *See Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1211-12 (5th Cir. 1989). So too, the recognized historic effects of discrimination in the areas of health, employment, and education impact negatively on minority political participation. The majority vote requirement, staggered terms, and at-large structure also tend to suppress minority voters' influence. *See De Grandy*, 114 S. Ct. at 2660-61; *Collins*, 883 F.2d at 1236 (at-large system and staggered terms susceptible of diluting minority votes). The manner in which those black candidates who were elected managed to obtain and retain their seats attenuates the district's reliance on proportional representation, and similarly heightens our concern over the new election scheme, which while retaining the at-large structure,[10]

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[10] Following our decision in the first appeal in this case, the Arkansas legislature amended its school board election law to require seven single-member districts, or five single-member districts and two at-large representatives in all school districts having a minority population of 10% or more. If a school district has been found to not be in violation of the VRA, it is excepted from this provision. Ark. Code Ann. § 6-13-631.

removes the potential for winning on the basis of a split white vote.

No evidence of a candidate-slating process was adduced, nor was any evidence of racial appeals presented, but the presence of such insidious accoutrements is unnecessary in situations where the process controls the result, and their absence does not preclude finding a Section 2 violation. Further, the district court's finding that the school board was not unresponsive to the minority community was predicated on its belief that because those black candidates who did serve on the board were the minority-preferred candidates, those who did not win election to the board must have been rejected by black voters as potentially less responsive. Our earlier discussion of the minority-preferred candidate status counters that proposition. Even accepting the finding of responsiveness as not clearly erroneous, however, it is similarly insufficient to counter the other factors that censure this scheme. *See Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1123 (5th Cir. 1991).

The totality of the circumstances on this record leaves us with the firm conviction that the Blytheville school board electoral scheme is institutionally restrictive, thereby creating "an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Racial polarization effectively cripples minority attempts to effect representation on the school board in the absence of the fortuity of white voter acquiescence. The fact that the current school board election system is less accessible to minority participation than that of ten or twenty years ago runs contrary to the intent and standard of Section 2.

The Supreme Court's recent redistricting decision in *Miller* does not alter our analysis of the *Gingles* factors or our ultimate decision in this appeal. *Miller* analyzed the equal protection problems involved in drawing voting districts along race-based lines, but did not purport to alter our inquiry into the vote-dilution claim. *See* 115 S. Ct. at 2485-86. We do, however, sound a cautionary note to the district court on remand to steer clear of the type of racial gerrymandering proscribed in *Miller*, while keeping in mind the need to vindicate the rights of the minority voters.

Our holding that plaintiffs are entitled to relief on their claim perforce forecloses defendant's application for sanctions pursuant to Fed. R. Civ. P. 11 and attorneys' fees pursuant to 42 U.S.C. § 1988.

The judgment is affirmed in part and reversed in part, and the case is remanded to the district court for the entry of an appropriate remedial decree.

LOKEN, Circuit Judge, with whom BOWMAN, MAGILL, BEAM, and MORRIS SHEPPARD ARNOLD, join, dissenting.

In my view, the court relies upon inadequate and unreliable statistical evidence to justify disregarding "consistent and sustained success by [African-American] candidates [that] is presumptively inconsistent with the existence of a § 2 violation." *Thornburg v. Gingles*, 478 U.S. 30, 102 (1986) (O'Connor, J. concurring). Therefore, I respectfully dissent.

A. Insufficient Evidence of Racially Polarized voting

The district court found that plaintiffs failed to prove the third *Gingles* precondition, that the white majority in the Blytheville School District "votes sufficiently as a bloc to enable it – in the absence of special circumstances . . . usually to defeat the minority's preferred candidate." 478 U.S. at 51. To qualify as "legally significant white bloc voting," the Supreme Court explained in *Gingles*, the white vote must be sufficiently polarized that it will "normally . . . defeat the combined strength of minority support plus white 'crossover' votes." 478 U.S. at 56. In overturning the district court's ultimate finding that the third precondition was not proved, this court relies primarily on a subsidiary finding that voting in Blytheville School Board elections has been "highly polarized." *Ante* at 13. That is a clearly erroneous finding, improperly made in the first instance by this court, not the district court.

At trial, plaintiffs relied on statistical analysis by their expert, James R. Lynch, a Senior Research Specialist in the Institute of Government at the University of Arkansas at Little Rock. As Appendix I reflects, Lynch submitted District-wide vote totals for every Blytheville School Board election from 1969 to 1992 that included an African-American candidate. He also presented vote totals by voting district for ten of those elections, in 1982, 1987, 1988, 1989, 1990, and 1991. Beyond that, all of Lynch's data were in percentage form. He calculated the black voting age population percentage ("BVAP") for

each voting district, based on 1980 census data. He calculated the percent of the vote captured by African-American candidates in each voting district in the ten selected races. He then employed a "correlation coefficient" to conclude that there was an "overwhelming relationship . . . between BVAP and the percent of vote that the black candidates got." *See* Appendix II. Lynch did not perform an extreme case analysis or a complete bivariate ecological regression analysis, methods the Supreme Court noted are "standard in the literature for the analysis of racially polarized voting." *Gingles*, 478 U.S. at 53 n.20. Thus, the record here contains far less probative statistical data than was developed in other recent Voting Rights Act cases such as *National Ass'n for the Advancement of Colored People, Inc. v. City of Niagara Falls*, 65 F.3d 1002, 1005-06 & nn. 2-4 (2d Cir. 1995), and *Clay v. Board of Educ.*, 896 F. Supp. 929, 934-36 (E.D. Mo. 1995).[1]

Lynch's statistical analysis was more than inadequate, it was faulty. His most serious mistake was in equating racially cohesive voting and racially polarized voting, an equation contrary to *Gingles*. Racial cohesiveness and racial polarization are elements of different *Gingles* preconditions. Political cohesiveness is the second *Gingles* precondition – "a showing that a significant

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[1] In addition, Lynch was not a properly qualified expert. He disclaimed expertise in statistics. He described the correlation coefficient as "simply a technique which one can employ." He could not explain his use of the "R square" factor, and he did not even attempt to explain the "F value" by which he purported to find statistical significance. It is doubtful that his statistical analysis and opinions were even admissible under Fed. R. Ev. 702.

number of minority group members usually vote for the same candidates." 478 U.S. at 56. I agree with the court that Lynch's data tend to show that African-American voters have been politically cohesive in recent Blytheville School Board elections.

Racial polarization, however, is the essential component of the third *Gingles* precondition – a pattern of white bloc voting that permits the majority usually to defeat the minority's preferred candidates, thereby diluting the minority's vote. Racial polarization requires a focus on whether "black voters and white voters vote differently." *Gingles*, 478 U.S. at 53 n.21; *Clay*, 896 F. Supp. at 935-36. In making findings of racial polarization, "we rely primarily on actual events and practical politics." *Jeffers v. Clinton*, 730 F. Supp. 196, 208 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991). Therefore, in measuring this factor, elections under a prior electoral system, elections in which there was no African-American candidate, the size and influence of the white crossover vote, and the strength of a minority preferred candidate's support become relevant. *See Niagara Falls*, 65 F.3d at 1012-17; *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995) (plaintiffs' expert's analysis flawed because he only analyzed elections involving a minority candidate), *petition for cert. filed*, 64 U.S.L.W. 3318 (U.S. Oct. 12, 1995) (No. 95-647). For the most part, plaintiffs did not gather such data, and what there is in the record they urge us to ignore.

The district court's finding of "racially polarized" voting reflected Lynch's analytical error:

> The testimony of Mr. James Lynch at trial, based on analyzing past elections and voting patterns, established that *voting in the School District is racially polarized in that usually the majority of black voters vote for black candidates and the majority of white voters vote for white candidates.*

Harvell, 759 F. Supp. at 527-28 (emphasis added). This is simply a mislabeled finding of political cohesiveness, the second *Gingles* precondition. This court then converts that limited finding into a far broader finding of "highly polarized" voting. A brief review of the undisputed facts demonstrates that the record will not support this additional finding:

- From 1975 until 1991, two of the eight School Board members were African-Americans. Until Norvell Moore, a four-term incumbent, elected not to run in 1991, the 29% African-American voting age minority had succeeded in electing 25% of the School Board for sixteen straight years, under an entirely at-large election system. Presumptively, therefore, racially polarized white bloc voting has not unlawfully diluted the minority's vote.

- In 1982, two African-American candidates each ran against a single white opponent. Dr. Helen Nunn won, receiving 33% of the votes in precincts having more than an 80% white voting age population. Incumbent Ayre Lester received 19% of the votes in those precincts and lost. In 1987, Norvell Moore ran head-to-head against a white opponent. Mr. Moore received 46% of the votes in those predominantly white precincts and won. This is undeniable evidence of *Legally significant*, continuing white crossover voting. Yet it was not assessed by the district court because Lynch did not know the difference

between racially cohesive voting and racially polarized voting. This court then compounds that legal error with the question-begging observation that white crossover voting cannot be legally significant because there has been a finding of "consistent polarization." *Ante* at 7.

• Plaintiffs' analysis relies on the fact that African-American candidate Shirley Harvell received 79% of the votes cast in 1990 in the predominantly minority Robinson Elementary School voting district. But Harvell received only 63 votes from that district, whereas Dr. Nunn received 247 votes from that district in her 1982 victory, and Mr. Lester, who barely lost in 1982 despite being in very poor health, received 227 votes at Robinson Elementary School. Without knowing the size of the voting age population of each district, as well as its percentage of minority voters, we cannot assess whether white bloc voting was the likely cause of Harvell's defeat.

The Supreme Court recently cautioned that " 'minority political cohesion' and 'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. Unless these points are established, there neither has been a wrong nor can be a remedy." *Growe v. Emison,* 113 S. Ct. 1075, 1084 (1993) (citation and footnote omitted). This court has improperly transformed the district court's finding that most voters vote for candidates of their own race into a blanket assumption that racially polarized white bloc voting usually prevents the election of minority preferred candidates. The record will not support that appellate court finding. *Compare Magnolia Bar Ass'n, Inc. v. Lee,* 994 F.2d

1143, 1148-50 (5th Cir.) (where African-American candidates won two high profile elections with 58% and 30% of the white vote, no clear error in finding the third precondition not satisfied despite expert's testimony that white bloc voting was legally significant and these elections were aberrational), cert. denied, 114 S. Ct. 555 (1993).

B. Minority Preferred Candidates Are Not Usually Defeated

The third *Gingles* precondition also requires proof that white bloc voting usually will defeat "the minority's preferred candidate.[2] The court finds that all losing African-American candidates since 1987 were minority preferred, looking only at whether they received most of the votes in minority-dominated districts. That is a logical assumption in most cases involving a racially cohesive electorate. But we are reviewing the district court's contrary finding under a clearly erroneous standard that "preserves the benefit of the trial court's particular familiarity with the indigenous political reality." *Gingles*, 478 U.S. at 79. In conducting that review, I begin with what the district court actually found:

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[2] By submitting data only on elections in which there was an African-American candidate, plaintiffs improperly shifted the *Gingles* focus from "minority preferred candidates" to "minority candidates." In my view, given the sustained success of many African-American candidates in the recent past, a finding of racially polarized white bloc voting could only be made after thorough analysis of the relative success of the minority preferred candidates in *all* elections.

> [P]rior to 1988, the lowest number of votes that any black candidate received was 629 and the highest was 1232. On the average, black candidates received nearly 977 votes. On the other hand, since 1988, the most votes received by any black candidate was 374 and the lowest was 135. The average since 1988 has been 237 votes per black candidate. White candidates received an average total of 1264 votes prior to 1988, with the highest being 2212 and the lowest being 606. Since 1988, white candidates have received an average of 1064 votes, with the highest being 1345 and the lowest being 758. The following chart of averages is helpful.
>
> | | White Candidates | Black Candidates |
> |---|---|---|
> | 1969-1987 | 1264 | 977 |
> | 1988- | 1064 | 237 |
> | Percent Change | 15.8% | 75.7% |
>
> . . . The Court is of the opinion that none of the black candidates since 1988 have been the "preferred" candidate of the black community. . . . Plaintiffs have failed to show that the reason they are unable to maintain proportional representation is because of the way the white majority votes. . . . Indeed, one of the candidates who had been the overwhelming choice of the black population [Norvell Moore] chose not to run for reelection.

A review of the entire record persuades me that this finding is not clearly erroneous:

- If the eight unsuccessful African-American candidates since 1987 had received as many votes as Dr. Nunn received in her successful contested race in 1982 (the first

time she ran), three would have won outright and two more would have forced run-off elections under the new majority-vote rule. (Given the results of prior elections, the court's speculation that whites will always win run-off elections, *ante* at 10-11, is unwarranted.)

- In 1988, African-American candidate Curtis Smith lost an election to white candidate Bill Sullivan, 758 to 166. Smith *did not carry* the Mississippi County Implement Company district, which has a BVAP of 80%, by far the highest of any voting district. Yet the court finds that Smith was the minority preferred candidate.

- Plaintiffs' Exhibit 26, a copy of the official election returns, reports that in 1990, white candidate Littrell received 62 votes and plaintiff Harvell received 7 votes in the East End Fire Station district, one of three districts having a higher BVAP than the Blytheville School District as a whole. Plaintiffs' Exhibit 14, prepared by Lynch, reports that plaintiff Harvell captured 60% of the vote in that district, rather than the 10% she actually received. Based upon Lynch's grievous error, plaintiffs contend and now this court finds that Harvell was the minority preferred candidate in that election.

- The votes cast in the two districts with a BVAP majority accounted for 26% of the total votes in the 1982 election (when Dr. Nunn won and Mr. Lester barely lost), but only 14% of the votes in 1989, 12% in 1990, and 13% in 1991.

- Only one African-American candidate since 1987 has received a majority of the votes cast in the district

that most closely mirrors the total School District population (40% minority). In 1982, Dr. Nunn and Mr. Lester received over 75% of the votes in a similar district.

In my view, this is overwhelming evidence that factors other than racially polarized voting, or the 1987 election law change, account for the election defeats of African-American candidates in recent years. Yet the court dismisses the obvious import of this evidence with the comment that it "stands to reason" that the 1987 change in the law caused the precipitous drop in minority voter turnout. *Ante* at 8. I disagree. Prior to 1987, African-American candidates had won four of the previous five contested elections against white candidates. They had received an absolute majority in two of the previous three elections. With that voting history, only preconceived notions of racial voting behavior could lead the court to conclude that the majority-vote rule caused minority voters to lose all hope of success.

We should not forget that we deal here with the politics of education, not with the election of general purpose legislators. Dr. Nunn testified on cross examination that she opposed single-member districts "[b]ecause I have spent my life working with the total community, working together, and I think that's one way to improve quality of education." Plaintiff Hattie Middlebrook, an unsuccessful candidate in 1990, testified that Board members Norvell Moore and Dr. Nunn were no longer minority preferred candidates because of their consensus-building political views. On this record, I reject the court's unsupported speculation that it was the spectre of white bloc voting, or the change to majority rule in 1987,

that caused the vast majority of potential African-American voters not to support candidates such as Ms. Middlebrook. The district court's findings as to the third *Gingles* precondition should be affirmed.

C. Consistent and Sustained Minority Representation

In *Gingles*, six Justices agreed that "consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation." 478 U.S. at 102 (O'Connor, J., concurring). While proportional minority representation is not a safe harbor that automatically defeats a claim of vote dilution, it should be given "extremely heavy weight." *African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1355-56 (8th Cir. 1995). Section 2 does not "require maximization of minority-group representation." *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 56 F.3d 904, 910 (8th Cir. 1995) (no § 2 violation where minority comprising 29% of the district's voting age population has held 28.6% of the Little Rock School Board seats continuously for twenty years).

In this case, an African-American has held a seat on the School Board every year since 1974, and there were two African-Americans on the Board – proportional representation – for sixteen consecutive years. The court dismisses this "consistent and sustained success" as the product of "special circumstances." For example, the court disregards Dr. Nunn's most recent success because she ran unopposed for a third term in 1990. While *Gingles* noted that incumbency and lack of opposition *may* be "special circumstances" that do not disprove a racially

polarized electorate, a finding to that effect requires factual analysis. Dr. Nunn's prior victories and standing in the at-large community may well have persuaded potential white candidates that she was unbeatable. In a district with only 29% minority voters, that would be strong evidence that the electorate is *not* so racially polarized that African-Americans "have less opportunity . . . to elect representatives of their choice," the ultimate issue under § 2. *See Sanchez v. Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990). "It borders on the absurd, of course, to suggest that an individual's success in politics should be discounted as aberrational because the person is qualified and popular." *Niagara Falls*, 65 F.3d at 1021 n.22.

I am particularly distressed by the court's suggestion that the challenged system violates § 2 because it "allows only for victory of majority-preferred minority candidates," *ante* at 12, and its criticism of the manner in which successful African-American candidates "managed to obtain and retain their seats," *ante* at 14. Apparently, the court believes that only a racially balkanized election system can comply with the Voting Rights Act. I subscribe to a contrary principle – that "[n]o legal rule should presuppose the inevitability of electoral apartheid – least of all a rule interpreting a statute designed to implement the Fourteenth and Fifteenth Amendments to the Constitution." *Niagara Falls*, 65 F.3d at 1016.

D. Conclusion

For the foregoing reasons, I conclude that plaintiffs have failed to prove that legally significant white bloc

voting in the Blytheville School District usually defeats a minority preferred candidate. Accordingly, they have not satisfied the third *Gingles* precondition, nor have they established by a totality of the circumstances that the challenged election system results in the minority vote dilution that § 2 prohibits.

I do not know whether the 1987 majority-vote law will ultimately work to deprive minority voters in the Blytheville School District of their rights under § 2. It may be that minority-preferred candidates will emerge but persistently fail to achieve proportional electoral success. In that case, § 2 relief will no doubt be warranted because, in the presence of strongly polarized white block voting, a majority-vote rule combined with at-large voting districts and a 30% minority voting age population most likely violates § 2. *Cf. City of Port Arthur v. United States*, 459 U.S. 159, 167 (1982). But absent proof of sufficiently polarized white bloc voting, § 2 relief should be denied.[3] Our function under the Voting Rights Act is not "to dictate to the provinces the 'correct' theories of democratic representation, the 'best' electoral systems for securing truly 'representative' government, the 'fairest'

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[3] If plaintiffs were entitled to relief, it would only be an injunction against the 1987 majority-vote rule. The court's opinion implies that the district court must now enter an "appropriate remedial decree" creating single-member voting districts. Given the sustained success of minority preferred candidates under the prior, plurality at-large system, this remedy violates the congressional intent that the 1982 amendments to § 2 not be construed as "an all-out assault on at-large election systems in general." S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205. Thus, I also dissent from the remedial portion of the court's decision.

proportions of minority political influence, or . . . the 'proper' sizes for local governing bodies." *Holder v. Hall*, 114 S. Ct. 2581, 2602 (1994) (Thomas, J., concurring). Therefore, I would affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX I

The following table is a compilation of election results for the Blytheville, Arkansas, School Board from 1969 to 1992. Black candidates are designated by "B" and white candidates are designated by "W."

YEAR	CANDIDATES	B/W	VOTES
1969	Dr. James C. Guard Mrs. Carrie B. White	W B	1,014 769
1970	Mason F. Day, Jr. O. W. Weaver	W B	2,212 1,074
1973	W. J. Tomlinson Rev. T. J. Green	W B	1,068 907
1974	Edwin L. Holstead Dan M. Burge Ayre E. "Pop" Lester	W W B	415 885 1,232
1975	George "Preacher" Nichols Richard "Dick" Reid Bill D. Jackson Mrs. Allen Bush Norvell Moore	W W W W B	182 582 331 812 1,068
1978	Ayre E. "Pop" Lester	B	Unopposed
1979	Norvell Moore	B	Unopposed
1982	Jerry Nall Ayre E. "Pop" Lester Harold Edwards Dr. Helen Nunn	W B W B	1,107 948 901 1,187
1983	Norvell Moore	B	Unopposed
1986	Dr. Helen Nunn	B	Unopposed
1987	Edwin L. Holstead Norvell Moore	W B	606 629
1988	Bill Sullivan Curtis "Preacher" Smith	W B	758 166
1989	Harold Sudbury, Jr. Thurman J. Green, II Steve Littrell Shirley M. Harvell Steward R. Jerome Lawrence B. Haley	W B W B W B	1,302 287 1,299 305 1,226 374
1990	Steve Littrell Shirley Harvell Dr. Helen Nunn	W B B	810 135 Unopposed
1991	Karen Sue Fraser Phyllis Bloodworth Hattie G. Middlebrook James T. McMahan Doug Wilson Shirley Harvell	W W B W W B	927 388 232 861 484 223
1992	Bill Sullivan Bill Stovell, III Shirley Milliken	W W B	Unopposed 456 173

APPENDIX II

YEAR	CANDIDATES	CORRELATION COEFFICIENT*
1988	Bill Sullivan Curtis "Preacher" Smith	0.8437
1989	Harold Sudbury, Jr. Thurman J. Green, II	0.9582
	Steve Littrell Shirley M. Harvell	0.9674
	Steward R. Jerome Lawrence B. Haley	0.9673
1990	Steve Littrell Shirley M. Harvell	0.9086
1991	Karen Sue Fraser Hattie G. Middlebrook	0.942
	James T. McMahan Shirley M. Harvell	0.928
1992	Bill Stovell, III Shirley Milliken	0.838

* The Correlation Coefficient (the "r" statistic) measures the strength of a relationship between two variables. The "r" may range from 0.0 (indicating the two variables are independent) to +1.0 (indicating the two variables are perfectly correlated in a positive direction).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1009EAJ

Shirley M. Harvell, et al., Appellants,	*	Appeal from the United States District Court for the Eastern District of Arkansas
vs.	*	
Blytheville School District #5, etc., et al., Appellees.	*	

Appellees' petition for rehearing has been considered by the court and is granted. The opinion and judgment of this court entered August 24, 1994, are vacated.

The case is set for oral argument at 11:00 A.M. on Thursday, January 12, 1995, in the U.S. Court and Custom House in St. Louis, Missouri.

November 16, 1994

Order Entered at the Direction of the Court
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-1009

SHIRLEY M. HARVELL; EMMANUEL LOFTON, Reverend; HATTIE MIDDLEBROOK; MARY ALICE JONES; JACQUELIN HENTON,	
Appellants,	
v.	
BLYTHEVILLE SCHOOL DISTRICT #5, A Public Body Corporate; WILLIAM TOMLINSON, Individually and as Board Member; NORVELL MOORE, Individually and as Board Member; WILLIAM SULLIVAN, Individually and as Board Member; HAROLD SUDBURY, JR., Individually and as Board Member; HELEN NUNN, Individually and as Board Member; KAREN FRASER, Individually and as Board Member; STEVE LITTRELL, Individually and as Board Member; WILLIAM STOVALL, III, also known as Bill Stovell, Individually and Board Member; BLYTHEVILLE SCHOOL DISTRICT #5, BOARD OF DIRECTORS; DR. FRANK LADD, Individually and in his official capacity as Superintendent of Blytheville School District No. 5,	Appeal from the United States District Court for the Eastern District of Arkansas.
Appellees.	

Submitted: June 17, 1993

Filed: August 24, 1994

Before WOLLMAN and LOKEN, Circuit Judges, and HUNTER,* Senior District Judge.

WOLLMAN, Circuit Judge.

Shirley Harvell and other voters in the Blytheville School District appeal from the district court's order and supplemental findings of fact dismissing their Voting Rights Act complaint following our remand in *Harvell v. Ladd*, 958 F.2d 226 (8th Cir. 1992). The defendants cross-appeal from the district court's denial of their motion for attorneys' fees and Rule 11 sanctions. We affirm in part and reverse in part.

I.

The Blytheville School District (the "district") encompasses the city of Blytheville, Arkansas, and adjacent rural areas outside the city limits. According to the 1980 federal census, the district has a population of 23,500, of whom approximately 64% are white and 35% are black. The voting age population, the pertinent population for Voting Rights Act purposes, is 14,500, of whom approximately 70% are white and 29% are black. The district court found that the black population in the district is

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* The HONORABLE ELMO B. HUNTER, Senior United States District Judge for the Western District of Missouri, sitting by designation.

geographically compact, located on the south side of the city of Blytheville, and is a politically cohesive group.

The Blytheville School Board ("the board") consists of eight members. Each member serves a four-year term, and two terms expire each year. Under the election scheme that was in place until 1987, the candidate who received the most votes was elected to the board, whether or not that candidate received a majority vote. "When several candidates would run for one slot, only one of them black, the white vote would be split among the white candidates, while the black vote would concentrate on the black candidate, and the black candidate would be elected." *Harvell*, 958 F.2d at 228.[1] In 1987, this voting scheme was changed by statute to require board members to be elected by majority vote. Ark. Code Ann. § 6-14-121. Thus, unless one candidate receives a clear majority of the votes on the first round, there will be a run-off election between the two candidates who have received the most votes in the first round. No run-off elections have occurred since 1987 because all successful candidates have been elected by a majority of votes cast in the first round.

Prior to the 1970s, Blytheville voters had picked few black candidates to represent them on the Blytheville School Board. Beginning in 1974, however, with the election of Ayre E. "Pop" Lester, there has always been at

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[1] This process is referred to colloquially as "bullet voting" or "single-shot voting."

least one black board member.[2] From 1975 through 1991, two of the eight board members were black. All but two of the black members were elected to the board through unopposed races or bullet voting. Dr. Helen Nunn defeated a white candidate in 1982, then was re-elected in unopposed races in 1986 and 1990. Norvell Moore was elected through bullet voting in 1975. He was re-elected in unopposed races in 1979 and 1983. After winning re-election in 1987, Moore chose not to run for re-election in 1991.

Harvell, an unsuccessful black candidate for the board, and four black citizens[3] of the district brought suit under Section 2 of the Voting Rights Act in the fall of 1989, after two elections under the new scheme. Harvell challenged the at-large election of board members under the 1987 majority vote scheme. Harvell proposed an eight district scheme, under which one member of the board would be elected from each district. The district court found that the sustained electoral success of black candidates in filling two out of eight board positions precluded a finding of a Section 2 violation. *Harvell v. Ladd*, 759 F.

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[2] The successful black candidates and their respective terms of service on the board are as follows: Ayre E. "Pop" Lester (1974-82); Norvell Moore (1975-91); Dr. Helen Nunn (1982-).

[3] The five named plaintiffs are Shirley M. Harvell, Rev. Emmanuel Lofton, Hattie Middlebrook, Mary Alice Jones, and Jacquelin Henton. Harvell was an unsuccessful candidate for the board in 1989, 1990, and 1991. Middlebrook was defeated in her attempt to run for the board in 1991, after this suit was initiated. For the sake of convenience, we refer to the plaintiffs in this opinion collectively as "Harvell."

Supp. 525, 529 (E.D. Ark. 1991). Accordingly, the district court held that Harvell had not set forth a prima facie case for a violation of Section 2 of the Voting Rights Act, dismissed Harvell's complaint, and entered judgment in favor of the defendants. *Id.* at 529-30.

Harvell appealed, contending that the district court had erred in finding that a sustained minority presence on the board precluded a finding of a violation of the Act. *Harvell*, 958 F.2d at 228. Harvell further contended that the district court had failed to make findings sufficient to satisfy the requirements of *Buckanaga v. Sisseton Independent School District. No. 54-5*, 804 F.2d 469, 472 (8th Cir. 1986). *Id.* The defendants cross-appealed, contending that the district court had erred in denying their motion for sanctions and attorneys' fees and in refusing to dismiss the case on the basis of laches and equitable principles. *Id.*

We affirmed the denial of sanctions, but reversed the judgment dismissing the complaint and remanded to the district court for entry of further factual findings concerning the nine factors contained in the Senate Report accompanying the Voting Rights Act and set forth in *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986). *Ladd*, 958 F.2d at 230. Because of the change from a plurality to a majority vote scheme in the 1988 election and thereafter, we cautioned that "successes prior to the 1988 majority vote requirement do not necessarily reflect the black voters' present ability to elect representatives of their choice under the current election scheme." *Id.*

On remand, the district court entered findings with respect to each of the nine Senate Report factors. *See* Dist.

Ct. Order, No. J-C-89-225 (E.D. Ark. Dec. 18, 1992). The court again dismissed Harvell's complaint, this time based upon its finding that Harvell had failed to satisfy the third *Gingles* precondition because she did not "prove that the white majority votes such as to enable it 'usually to defeat the minority's *preferred* candidate.' " *Id.* at 9 (quoting *Ladd*, 958 F.2d at 229) (emphasis added by district court). The court held that Harvell had failed to meet her burden because the post-1987 low minority voter turnout could indicate that the black candidates were not the minority's preferred candidates.

Harvell now appeals from the district court's finding that she failed to satisfy her burden in proving the third *Gingles* precondition. Harvell also contends that the court's findings with respect to a number of the Senate Report factors are clearly erroneous. Defendants cross-appeal, reiterating their request for sanctions under Federal Rule of Civil Procedure 11 and for attorneys' fees under 42 U.S.C. § 1988.

II.

In 1982, Congress amended Section 2 of the Voting Rights Act to repudiate the "intent test" of *City of Mobile, Alabama v. Bolden*, 446 U.S. 55 (1980). *Gomez v. City of Watsonville*, 863 F.2d 1407, 1411 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989). Absent a showing that an electoral scheme was intentionally designed or maintained for a discriminatory purpose, the *Mobile* plurality did not permit a Section 2 challenge to the scheme. *Mobile*, 446 U.S. at 62-65. The 1982 amendments replaced the intent test with a "results test." *Gomez*, 863 F.2d at 1411. Section 2, as

amended, prohibits any state or political subdivision from using any "voting qualification or prerequisite to voting or standard, practice, or procedure which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 42 U.S.C. § 1973(a). *But see Holder v. Hall*, 114 S. Ct. 2581 (1994) (holding that the size of a governing body is not subject to a Section 2 vote dilution challenge).

To establish a violation of Section 2, the plaintiff must show, based on the totality of the circumstances, that "members [of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 1973(b). In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court delineated three preconditions that the plaintiff must establish to show that a multimember district violates Section 2.

First, the plaintiff must show that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district. *Id.* at 50. Second, the plaintiff must show that the minority group is politically cohesive. *Id.* at 51. Third, the plaintiff must show that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. *Id.; see also Growe v. Emison*, 113 S. Ct. 1075, 1084 (1993).

In *Gingles*, the Supreme Court also set forth nine factors that the Senate mentioned in its report accompanying the Voting Rights Act to guide a court in determining whether the challenged electoral scheme dilutes the minority's voting strength. *Gingles*, 478 U.S. at 36.

These include (1) the history of voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the state or subdivision is racially polarized; (3) the extent to which the state or subdivision has used voting practices or procedures that tend to enhance opportunities for discrimination against the minority group; (4) whether minority candidates have been denied access to any candidate slating process; (5) the extent to which minorities have borne the effects of past discrimination in relation to education, employment, and health; (6) whether local political campaigns have used overt or subtle racial appeals; (7) the extent to which minority group members have been elected to public office in the jurisdiction; (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of members of the minority group; and (9) whether the policy underlying the use of voting qualifications is tenuous. *Id.* at 36-37.

III.

We apply the clearly erroneous standard of review to a district court's ultimate finding of fact that a Voting Rights Act violation has not occurred. *Gingles*, 478 U.S. at 78-79; *Ladd*, 958 F.2d at 229. We will, however, "correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Gingles*, 478 U.S. at 79 (quoting *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501 (1984)). When a district court's findings are set aside because they rest on an erroneous view of the law, the case is usually remanded so that the district court can determine the

issue using the correct legal standard. *Gomez*, 863 F.2d at 1411 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982)). Remand is not necessary, however, when the record "permits only one resolution of the factual issue." *Id.* (quoting *Pullman-Standard*, 456 U.S. at 287).

We turn, then, to Harvell's claim that the district court erred in finding that she had failed to prove the third *Gingles* precondition, namely, that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51.

Courts generally examine actual election returns in analyzing the *Gingles* preconditions. *See Gingles*, 478 U.S. at 63; *Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987); *Smith v. Clinton*, 687 F. Supp. 1310, 1317 (E.D. Ark. 1988) (three-judge court). A court analyzing the second *Gingles* precondition, minority political cohesiveness, should look only to actual voting patterns rather than speculating as to the reasons why many minorities are apathetic. *Gomez v. City of Watsonville*, 863 F.2d 1407, 1416 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989). Likewise, a court analyzing the third *Gingles* precondition should identify the preferred minority candidate by referring to how the minority voters actually cast their ballots rather than speculating why some minority voters choose not to cast ballots. *See, e.g., Collins*, 816 F.2d at 937-38 (candidate who receives most minority votes is preferred minority candidate); *Jeffers v. Clinton*, 730 F. Supp. 196, 208-09 (E.D. Ark. 1989) (three-judge court) (examining previous election returns and considering only the preferences of the minority voters who voted), *aff'd*, 498 U.S. 1019 (1991).

The record in this case contains no persuasive evidence explaining the post-1987 decrease in minority voter turnout. Moreover, low minority voter registration and turnout often evidence electoral schemes in which minorities do not have an equal opportunity to participate in the electoral process and elect representatives of their choice. *Gomez*, 863 F.2d at 1416 n.4 (citing *Gingles*, 478 U.S. at 38-39). The district court should have identified the preferred minority candidates by considering only how the minority voters actually voted rather than engaging in speculation concerning the causes of minority voter apathy. We conclude, therefore, that the district court erred in finding that because a threshold level of eligible minority voters did not go to the polls, the post-1987 black candidates were not preferred minority candidates. We express no opinion, however, concerning the relevance of minority voter apathy when there is compelling evidence directly linking such apathy to a candidate's unpopularity among the minority voters.

Because the district court's findings rest on an erroneous view of the law, they must be set aside. We need not remand this case, however, because the record establishes that the post-1987 minority candidates were the minority voters' preferred choice.

We cannot assume that every minority candidate is the minority voters' preferred choice. As the Third Circuit has held, the plaintiff must "establish on an election-by-election basis, by a preponderance of the evidence, which black candidates are minority-preferred." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2779 (1994). We find

persuasive the Third Circuit's discussion of how a plaintiff meets the burden of showing that a minority candidate is the voters' preferred choice:

> [E]xperience does demonstrate that minority candidates will tend to be candidates of choice among the minority community. This practical experience leads to the inference that any particular minority candidate is minority preferred, and thereby takes plaintiffs a considerable distance towards meeting their production burden on this issue. This inference, however, is not enough on its own to meet this burden. Rather, plaintiffs must introduce some additional evidence showing that the particular minority candidate is minority-preferred. The additional evidence required to meet the threshold, however, is not very substantial, and the burden may be satisfied with a variety of evidence, including lay testimony or statistical analyses of voting patterns.

Id.; *see also Jeffers*, 730 F. Supp. at 208 ("The fact is that there is a strong tendency for white voters to vote for white candidates when there is a black candidate in the race. Black voters behave in exactly the same fashion. . . . [I]t is a fact in present-day Arkansas politics, and there is no reason to suppose that it will change substantially in the near future.").

In this case, the evidence establishes that the post-1987 black candidates were preferred minority candidates. Through regression analysis, Harvell's expert determined that a very strong relationship existed between the black voting age population in a precinct and

the support black candidates received in that precinct.[4] The relationship between black voting age population and black candidate support was as strong in this case as in *Jenkins*. In *Jenkins*, the plaintiffs' expert performed a regression analysis to determine the degree of relationship between the racial composition in each political unit and the support a candidate received within that political unit. *Id.* at 1119 n.10. The statistical analysis yielded a correlation coefficient of 0.91, "which represents a highly consistent association between the number of votes received by a candidate of a particular race and the racial composition of the polling place." *Id.* at 1120. Because the regression analysis suggested that virtually 100% of the black voters voted for the black candidate, the Third Circuit concluded that the black candidate was the minority candidate of choice. *Id.* at 1127-28. Harvell's expert testified that his regression analysis indicated that black voters overwhelmingly vote for black candidates, and there is no evidence to rebut this showing. Accordingly, we conclude that the post-1987 black candidates were the minority's preferred candidates. *See also Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 501 n.11, 502 (5th Cir. 1987) (holding that correlation coefficients of .963 and .926 revealed a "significant number" of blacks voting for a black candidate and qualified the candidate as the black-preferred candidate), *cert. denied*, 492 U.S. 905 (1989).

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[4] Appendix II contains the results of the expert's statistical analysis.

Some lay testimony indicated that Harvell and Middlebrook may have had certain qualities that some minority voters may have found unappealing. There was no evidence, however, that these qualities caused Harvell and Middlebrook not to be the minority community's preferred candidates. Moreover, "[s]poradic lay testimony, while not irrelevant, is necessarily less indicative of black voters' voting patterns generally than the regression analysis." *Jenkins*, 4 F.3d at 1127.

As we discussed earlier, the district court emphasized the post-1987 low voter turnout. The statistical evidence, however, reveals that even in those elections in which the minority voter turnout was low, black voters overwhelmingly supported black candidates and white voters supported white candidates. We find the statistical analyses of the actual election returns more reliable than speculative explanations for the low voter turnout. Moreover, we have held that a court should limit its examination to actual election returns when the record does not adequately account for the cause of a particular voting pattern. Accordingly, because the record indicates that the post-1987 black candidates were the minority's preferred choice, we hold that Harvell has established the third *Gingles* precondition.

Recently, the Supreme Court reiterated that satisfying the three *Gingles* preconditions is not sufficient to establish a Section 2 violation. *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994) (finding that the district court erred by implicitly concluding that the failure to maximize the number of majority-minority districts violates Section 2). Thus, we turn to Senate Report factors to determine whether, based upon the totality of the circumstances,

Harvell has shown that because of the at-large election scheme, minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

The Supreme Court has recognized that when analyzing a Section 2 claim the two most important Senate factors are the extent to which voting is racially polarized and the extent to which minorities have been elected. *Gingles*, 478 U.S. at 48 n.15. Both of these factors weigh in favor of a finding of a Section 2 violation. The district court found that voting in the school board elections is racially polarized. *See* Dist. Ct. Order, No. J-C-89-225, at 5 (E.D. Ark. Mar. 19, 1991). The city does not dispute this finding. Since the enactment of the majority vote requirement, Dr. Nunn has been the only successful black candidate. The district court found that her victory fell within the "special circumstances" the Supreme Court recognized in *Gingles* because she ran unopposed as an incumbent. *Id.* at 7.

Harvell claims that the district court's findings on four other Senate factors are clearly erroneous. These other factors, if present, are "supportive of, *but not essential to*, a minority voter's claim." *Gingles*, 478 U.S. at 48 n.15. We will examine each of her arguments in turn.

The district court found that "historic discrimination in the Blytheville School District area in regards to health, education, and employment does impair the ability of some blacks to participate effectively in the electoral process." Dist. Ct. Order, No. J-C-89-225, at 5 (E.D. Ark. Dec.

18, 1992). The district court discounted this finding, however, because "it cannot be contested that many of the impediments and economic disadvantages of over a quarter century ago have been alleviated and their effect on voting in Blytheville today is questionable." *Id.* With all due respect, we conclude that the district court erred by discounting its initial finding in view of the uncontroverted evidence that the percentage of black citizens in Blytheville who live below the poverty level, who are unemployed, and who have not completed high school is significantly greater than the percentage of white citizens. Moreover, the record links the low socioeconomic status of blacks to their inability to participate effectively in the political process.

Although the district court acknowledged that it should take judicial notice of the history of official racial discrimination in the electoral process in Arkansas, it gave this factor little weight because of state and national efforts to end racial discrimination. *Id.* at 3. We have consistently found that "[t]he state has a history of official discrimination in its electoral process." *Whitfield v. Democratic Party of State of Ark.*, 890 F.2d 1423, 1424 (8th Cir. 1989), *cert. denied*, 498 U.S. 1126 (1991). As the Fifth Circuit has noted, because "Congress was concerned not only with present discrimination, but with the vestiges of discrimination which may interact with present political structures to perpetuate a historical lack of access to the political system[,] . . . the court must provide a sounder basis for its conclusion than its personal opinion that discrimination has been eradicated in the recent past." *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1211-12 (5th Cir. 1989). Because the

district court did not provide any reason other than its opinion concerning recently taken steps to eradicate discrimination, however laudable and salutary those steps may be, we agree with Harvell that the district court erred by giving insufficient weight to the history of racial discrimination in Arkansas.

When analyzing the extent to which the voting practices and procedures in Blytheville School District may enhance the opportunity for discrimination, the district court considered, as provided by the Senate Report, the majority vote requirement. The district court found that the Arkansas majority vote requirement might enhance the opportunity for discrimination against black voters. Dist. Ct. Order, No. J-C-89-225, at 4 (E.D. Ark. Dec. 18, 1993). The court noted, however, that there had been no run-off elections since the enactment of the majority vote requirement and that no black candidate would have been successful under the preexisting plurality system. *Id.* Although the implication of the district court's finding is that black voters are no worse off under the majority vote system than they were under the preexisting plurality system, we believe that the voting pattern established under the new system requires a contrary finding. Under the prior system, black candidates may have had a chance of electoral success; under the new system, given the voting patterns of post-1987 elections, they appear to have almost none. The district court found that the electorate is racially polarized because the "majority of black voters vote for black candidates and the majority of white voters vote for white candidates." Dist. Ct. Order, No. J-C-89-225, at 5 (E.D. Ark. Mar. 19, 1991). If only twenty-

nine percent of the voters (the black voting age population) vote for a black candidate, it is mathematically impossible for that candidate, absent the "special circumstances" the Supreme Court recognized in *Gingles*, to receive a majority of the votes.

Although there is some evidence to the contrary, the district court's finding that the board is responsive to the complaints and needs of the minority community is not clearly erroneous. As we have noted, however, this factor is not essential to Harvell's claim. Indeed, the Senate Report states that a lack of responsiveness by elected officials to the needs of the minority community would be a factor of only "limited relevance." 1982 U.S.C.C.A.N. 117, 206-07; *see also Westweco Citizens for Better Government v. City of Westwego*, 946 F.2d 1109, 1123 (5th Cir. 1991) (finding a Section 2 violation when the plaintiff did not prove a lack of responsiveness); *Jeffers v. Clinton*, 730 F. Supp. 196, 213-14 (E.D. Ark. 1989) (three-judge court) (same), *aff'd*, 498 U.S. 1019 (1991).[5]

In summary, we hold that the district court erred by finding that Harvell did not satisfy the third *Gingles* precondition. The record establishes that the post-1987 black candidates were the preferred minority candidates. After considering the totality of the circumstances, we conclude that the at-large electoral scheme dilutes the minority's voting strength. Accordingly, we reverse the district court's judgment dismissing Harvell's claim and

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[5] Because Harvell has not challenged the district court's findings with respect to the other Senate Report factors, we need not address them.

remand for implementation of a plan that comports with the requirements of Section 2.

Our holding that plaintiffs are entitled to relief on their claim perforce forecloses defendant's application for sanctions pursuant to Federal Rule of Civil Procedure 11 and attorneys' fees pursuant to 42 U.S.C. § 1988. Accordingly, we affirm the district court's denial of sanctions and attorneys' fees.

The judgment is affirmed in part and reversed in part, and the case is remanded to the district court for the entry of an appropriate remedial decree.

LOKEN, Circuit Judge, dissenting.

I respectfully dissent. For three reasons, I conclude that the record in this case does not establish that plaintiffs are entitled to relief under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, as construed in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

1. This appeal focuses primarily on the district court's finding that plaintiffs have not satisfied the third precondition to § 2 relief adopted in *Gingles* by proving that the white majority in the Blytheville School District "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 51. To qualify as "legally significant white bloc voting," the Court went on to explain in *Gingles*, the white bloc vote must "normally . . . defeat the combined strength of minority support plus white 'crossover' votes." 478 U.S. at 56.

In this case, neither the district court nor this court has found that the white majority "bloc votes" to a legally

significant extent as defined in *Gingles*. In addressing another issue, the district court found that "usually . . . the majority of white voters vote for white candidates." But that is not a finding of legally significant bloc voting by the white majority, because it fails to consider the combined strength of minority votes and majority crossover votes. Without a finding of legally significant white bloc voting, this court's analysis of the third *Gingles* precondition is fundamentally deficient.

Rather than analyze the bloc voting issue (or, more appropriately, remand to let the district court do so), the court makes the remarkable assertion that, "[i]f only twenty-nine percent of the voters (the black voting age population) vote for a black candidate, it is mathematically impossible for that candidate, absent the 'special circumstances' the Supreme Court recognized in *Gingles*, to receive a majority of the votes." *Ante* at 14. In other words, the court transforms the district court's finding that most voters vote for candidates of their own race into a blanket assumption that white voters in the Blytheville School District only vote for whites, despite the Supreme Court's recent admonition

> that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a

> statute meant to hasten the waning of racism in American politics.

Johnson v. De Grandy, 114 S. Ct. 2647, 2661 (1994). The court's assumption defies the facts in this case.

In 1982, two black candidates each ran against a single white opponent. Dr. Helen Nunn won, receiving 33% of the votes in precincts having more than an 80% white voting age population. Incumbent Ayre "Pop" Lester received 19% of the votes in those precincts and lost. In 1987, Norvell Moore also ran head-to-head against a white opponent. Mr. Moore received 46% of the votes cast in those predominantly white precincts and won. On this record, the court's conclusion that white bloc voting is usually able to defeat the minority's preferred candidate as a matter of law is unsustainable.

The Supreme Court recently cautioned that

> "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. Unless these points are established, there neither has been a wrong nor can be a remedy.

Growe v. Emison, 113 S. Ct. 1075, 1084 (1993) (citation and footnote omitted). I fear the court has missed this signal.

2. The third *Gingles* precondition also requires proof that white bloc voting usually will defeat "the minority's preferred candidate." In determining that the Blytheville School District's losing black candidates since 1987 were minority preferred candidates, the court ignores the low number of minority voters in those elections and looks

only at whether those losing candidates received most of the votes in minority-dominated precincts. But numerous cases confirm that low minority support is highly relevant to the preferred candidate issue. *See Collins v. City of Norfolk*, 883 F.2d 1232, 1238 (4th Cir. 1989) ("black candidates who received few votes were not the black community's preferred candidates"), *cert. denied*, 498 U.S. 938 (1990); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 & n.7 (5th Cir. 1988) (elections in which a minority candidate "gains little support from any segment of the community" need not be examined), *cert. denied*, 492 U.S. 905 (1989); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987) (only those elections offering voters "a viable minority candidate" are relevant under the third *Gingles* precondition), *cert. denied*, 492 U.S. 905 (1988). The reason is obvious – the Voting Rights Act is intended to alleviate minority vote dilution, not candidate unpopularity.

A review of the entire record persuades me that the district court did not commit clear error in finding that the losing black candidates since 1987 were not preferred minority candidates:

(a) In the twelve elections involving black candidates between 1969 and 1987, the black candidates received an average of 977 votes. Since 1988, black candidates have received an average of 237 votes (excluding Dr. Nunn's unopposed candidacy). In the two post-1987 races pitting two white candidates against a single black candidate, the black was defeated by both opponents (and therefore would not have been elected under the prior plurality-vote system).

(b) The number of votes cast in the two precincts with a black voting age majority accounted for 26% of the total votes in the 1982 election (when Dr. Nunn won and Pop Lester lost), but only 14% of the votes in the 1989 election, 12% in 1990, and 13% in 1991. Reflecting that decline, plaintiff Shirley Harvell received 90 of the 117 votes cast in those two precincts in 1990, whereas Mr. Lester received 456 of 522 votes and Dr. Nunn received 494 of 546 votes cast in those precincts in 1982.

(c) Only one black candidate since 1987 has received a majority of the votes cast in the precinct that most closely mirrors the total District population (40% black). In 1982, the two black candidates received over 75% of the votes cast in a similar precinct.

In my view, this is overwhelming evidence that the losing black candidates since 1987 were unpopular throughout the District and cannot be considered "the minority's preferred candidates." Yet the court dismisses this evidence with the comment that low minority voter turnout is "often evidence [of] electoral schemes in which minorities do not have an equal opportunity to participate." *Ante* at 8. Note the circular reasoning – the court is assuming that the system is illegal for the purpose of determining whether plaintiffs satisfied a *precondition* to proof of illegality. Moreover, the court's operative assumption – that the 1987 law caused massive black voter apathy – is factually without foundation. Prior to 1987, black candidates had won four of the previous five contested elections against white candidates, and had received the majority of votes cast in two of the previous three elections. With that electoral history, why would a

majority-vote requirement suddenly cause black voters to lose all hope of success?

For the foregoing reasons, I conclude that plaintiffs have failed to prove that legally significant white bloc voting in the Blytheville School District will usually defeat a black preferred candidate. Accordingly, they have not satisfied the third *Gingles* precondition and § 2 relief must be denied.

3. Even if plaintiffs could satisfy the third *Gingles* precondition, I conclude they have failed to prove a § 2 violation. In *Gingles*, six Justices agreed that "consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation." 478 U.S. at 102. In this case, a black citizen has held a seat on the Blytheville School Board every year since 1974. From 1975 until 1991, two of the eight elected Blytheville School Board members were black. Until Norvell Moore, a four-term incumbent, elected not to run in 1991, the 29% black minority succeeded in electing 25% of the Blytheville board members for sixteen straight years. "[A] minority cannot prove a § 2 violation in the face of continued and proportional success at the polls." *Collins v. City of Norfolk*, 816 F.2d 932, 937 (4th Cir. 1987).

The court dismisses this "consistent and sustained success" virtually without discussion. First, the court simply ignores Moore's close election victory against a white opponent in 1987. Astonishingly, the court does not even clarify whether the 1987 majority-vote law (Ark.

Code Ann. § 6-14-121) applied to that election, confirming that its entire § 2 analysis is based upon its *assumed* impact of that 1987 law.[6]

Next, the court dismisses the one successful black candidate since 1987 because Dr. Helen Nunn ran unopposed for a third term in 1990. While *Gingles* notes that incumbency and lack of opposition *may* be "special circumstances" that do not disprove a racially polarized electorate, we may not draw that conclusion without factual analysis. Dr. Nunn's prior election victories and standing in the at-large community may have persuaded potential white candidates that she was unbeatable. In a district with only 29% black votors, that would be strong evidence that the electorate is *not* so racially polarized that minority citizens "have less opportunity . . . to elect representatives of their choice," the ultimate issue under § 2. *See Sanchez v. Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990). The court has impermissibly replaced these fact issues with its own assumptions about Blytheville School District voters.

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[6] This highlights an analytical gap in the court's opinion that is potentially troublesome for the district court on remand. Plaintiffs' complaint attacked the District's at-large voting system. After condemning the 1987 law, the court declares that plaintiffs "are entitled to relief on their claim," *ante* at 15, without clarifying the nature of the intended relief. Congress warned that its 1982 amendments to § 2 should not be construed as "an all-out assault on at-large election systems in general." S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205. Thus, the relief should be expressly limited to remedying the perceived impact of the 1987 law.

Finally, the court simply ignores the pre-1987 black election victories, presumably because they occurred before the 1987 majority-vote law. Compare that analytical sleight-of-hand with *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1132 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2779 (1994), in which the court dismissed two-thirds of the relevant black election victories because they were "recent and, potentially, transitory." In other words, if a minority's "consistent and sustained success" is too dated *or* too recent to fit the judiciary's preconceived notions of voter behavior, courts may ignore that success! From my perspective, this kind of result-oriented analysis serves only to consecrate judicial assumptions about the way people vote so as to maximize judicial interference with and control over our democratic processes.

I do not know whether the 1987 majority-vote law will ultimately work to deprive minority voters in the at-large Blytheville School District of their rights under § 2. It may be that minority-preferred candidates will emerge but persistently fail to achieve proportional electoral success, in which case § 2 relief will no doubt be warranted. I think it is more likely that roughly the same number of blacks would be elected under both systems, but more "militant" blacks would be elected from the racially balkanized single-member districts plaintiffs desire.[7]

---

[7] Two of the recent unsuccessful black candidates testified that they are regarded as "militant" or "radical" by other members of the community. "[I]t is appropriate to consider testimony revealing how political observers and the candidates themselves viewed the . . . claim that [the candidates] were the minority's preferred candidates and representatives of choice." *Collins v. City of Norfolk*, 883 F.2d at 1238.

Plaintiffs, who have been unable to attract substantial black voter support under the current system, understandably want a new playing field. But our function is not "to dictate to the provinces the 'correct' theories of democratic representation, the 'best' electoral systems for securing truly 'representative' government, the 'fairest' proportions of minority political influence, or . . . the 'proper' sizes for local governing bodies." *Holder v. Hall*, 114 S. Ct. 2581, 2602 (1994) (Thomas, J., concurring). Plaintiffs have failed to prove a violation of § 2 of the Voting Rights Act, and I would affirm.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX I

The following table is a compilation of election results for the Blytheville, Arkansas, School Board from 1969 to 1992. Black candidates are designated by "B" and white candidates are designated by "W."

YEAR	CANDIDATES	B/W	VOTES
1969	Dr. James C. Guard Mrs. Carrie B. White	W B	1,014 769
1970	Mason F. Day, Jr. O. W. Weaver	W B	2,212 1,074
1973	W. J. Tomlinson Rev. T. J. Green	W B	1,068 907
1974	Edwin L. Holstead Dan M. Burge Ayre E. "Pop" Lester	W W B	415 885 1,232
1975	George "Preacher" Nichols Richard "Dick" Reid Bill D. Jackson Mrs. Allen Bush Norvell Moore	W W W W B	182 582 331 812 1,068
1978	Ayre E. "Pop" Lester	B	Unopposed
1979	Norvell Moore	B	Unopposed
1982	Jerry Nall Ayre E. "Pop" Lester Harold Edwards Dr. Helen Nunn	W B W B	1,107 948 901 1,187
1983	Norvell Moore	B	Unopposed
1986	Dr. Helen Nunn	B	Unopposed
1987	Edwin L. Holstead Norvell Moore	W B	606 629
1988	Bill Sullivan Curtis "Preacher" Smith	W B	758 166
1989	Harold Sudbury, Jr. Thurman J. Green, II Steve Littrell Shirley M. Harvell Steward R. Jerome Lawrence B. Haley	W B W B W B	1,302 287 1,299 305 1,226 374
1990	Steve Littrell Shirley Harvell Dr. Helen Nunn	W B B	810 135 Unopposed
1991	Karen Sue Fraser Phyllis Bloodworth Hattie G. Middlebrook James T. McMahan Doug Wilson Shirley Harvell	W W B W W B	927 388 232 861 484 223
1992	Bill Sullivan Bill Stovell, III Shirley Milliken	W W B	Unopposed 456 173

APPENDIX II

YEAR	CANDIDATES	CORRELATION COEFFICIENT*
1988	Bill Sullivan Curtis "Preacher" Smith	0.8437
1989	Harold Sudbury, Jr. Thurman J. Green, II	0.9582
	Steve Littrell Shirley M. Harvell	0.9674
	Steward R. Jerome Lawrence B. Haley	0.9673
1990	Steve Littrell Shirley M. Harvell	0.9086
1991	Karen Sue Fraser Hattie G. Middlebrook	0.942
	James T. McMahan Shirley M. Harvell	0.928
1992	Bill Stovell, III Shirley Milliken	0.838

* The Correlation Coefficient (the "r" statistic) measures the strength of a relationship between two variables. The "r" may range from 0.0 (indicating the two variables are independent) to +1.0 (indicating the two variables are perfectly correlated in a positive direction).

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

SHIRLEY HARVELL, REV. EMMANUEL LOFTON; HATTIE MIDDLEBROOK; MARY ALICE JONES and JACQUELIN HENTON — PLAINTIFFS

vs. NO. J-C-89-225

DR. FRANK LADD, Individually and in his Official Capacity as Superintendent of the Blytheville, Arkansas School District No. 5; THE BLYTHEVILLE, ARKANSAS SCHOOL DISTRICT NO. 5; and the Individual Board Members, WILLIAM "BILL" TOMLINSON; NORVELL MOORE; WILLIAM "BILL" SULLIVAN; HAROLD SUDBERRY; HELEN NUNN; KAREN FRAZIER; STEVE LITTRELL; and WILLIAM "BILL" STOVELL, III; Individually and in their Official Capacities as School Board Members of the Blytheville, Arkansas School District No. 5 — DEFENDANTS

FINDINGS OF FACT

(Filed Dec. 18, 1992)

I. INTRODUCTION

This matter is before the Court after remand from the Eighth Circuit "for entry of further findings. . . . " *Harvell v. Ladd*, 958 F.2d 226, 230 (8th Cir. 1992). According to the court, the district court failed to make the detailed findings required in a Voting Rights case.

> In order to review a district court's findings of fact and conclusions of law, a court of appeals must have before it sufficient detail to enable it to determine the factual and legal bases for the district court's judgment.

Id. at 229. Specifically, the district court was instructed to make findings in accordance with the nine factors set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). These factors are:

> "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> "2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> "3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> "4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> "5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> "6. whether political campaigns have been characterized by overt or subtle racial appeals;

> "7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Id. at 36-37 (quoting, Senate Judiciary Committee majority Report, at 38-29).

In regards to these factors, the Eighth Circuit stated that they are not to be used as a mechanical point-counting device. Conversely, "the court should, based on the totality of the circumstances and guided by the factors, determine whether the voting strength of the minority group is 'minimized or cancelled out.' " *Harvell*, 958 F.2d at 229.

II. FINDINGS

The Court makes the following findings in accordance with the mandate of the Eighth Circuit and the factors articulated in *Gingles*.

A. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.

Plaintiffs argue and defendants admit that the court should take judicial notice of the fact that there has been a long history of racial discrimination in the electoral process in Arkansas. *Jeffers v. Clinton*, 730 F.Supp. 196, 204 (E.D.Ark. 1989). The Court will take such notice. However, the Court notes that since 1964 there has been a concerted effort, at both state and national levels, to end this history of racial discrimination *de jure*. As this country makes strides in this respect with each passing day, this first factor deserves less weight in the determination of whether a violation of the Voting Rights Act has occurred.

B. The extent to which voting in the elections of the state or political subdivision is racially polarized;

The Court sees no reason to disturb its original finding on this factor. That finding read:

> The testimony of Mr. James Lynch at trial, based on analyzing past elections and voting patterns, established that voting in the School District is racially polarized in that usually the majority of black voters vote for black candidates and the majority of white voters vote for white candidates.

Harvell v. Ladd, J-C-89-225, Memorandum & Order at 5 (E.D.Ark. March 19, 1991).

C. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

The Court finds that the majority vote requirement in Ark.Code.Ann. § 6-14-121 may enhance the opportunity for discrimination against black voters. However, the Court notes that since this requirement has been in effect, a runoff election in the School District has not been necessary. In other words, an analysis of the numbers reveals that no black candidate would have been successful since 1987 even under the previous "plurality" system.

D. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

Plaintiffs admit no evidence of a candidate slating process was presented at trial.

E. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

The Court finds that historic discrimination in the Blytheville School District area in regards to health, education, and employment does impair the ability of some

blacks to participate more effectively in the electoral process. Specifically, the evidence presented regarding differences in per capita income, percentage of high school and college graduates, and unemployment rates convinces the Court that minorities in Blytheville have suffered the disadvantages of past discrimination. However, the Court would reiterate its sentiments detailed in finding "A" above in that these differences have been the subject of many remedy-minded efforts. Although no one would claim that the social mores of the entire country have come full swing since 1964, it cannot be contested that many of the impediments and economic disadvantages of over a quarter century ago have been alleviated and their effect on voting in Blytheville today is questionable.

F. Whether political campaigns have been characterized by overt or subtle racial appeals;

Plaintiff admits no evidence of overt or subtle racial appeals in Blytheville School District was presented. In fact, the Court credits the testimony of Dr. Ladd and Dr. Nunn in showing that no such appeals existed.

G. The extent to which members of the minority group have been elected to public office in the jurisdiction.

The election results involving black candidates for the Blytheville School District beginning in 1969 are as follows:

1969	
-Dr. James C. Guard (W)	1014
-Mrs. Carrie B. White (B)	769
1970	
-Mason F. Day, Jr. (W)	2212
-O.W. Weaver (B)	1074
1973	
-W.J. Tomlinson (W)	1068
-Rev. T.J. Green (B)	907
1974	
-Edwin L. Holstead (W)	415
-Dan M. Burge (W)	885
-Ayre E. "Pop" Lester (B)	1232
1975	
-George "Preacher" Nichols (W)	182
-Richard "Dick" Reid (W)	582
-Bill D. Jackson (W)	331
-Mrs. Allen Bush (W)	812
-Norvell Moore (B)	1068
1978	
-Ayre E. "Pop" Lester (B)	(Unopposed)
1979	
-Norvell Moore (B)	(Unopposed)
1982	
-Jerry Nall (W)	1107
-Ayre E. "Pop" Lester (B)	948
-Harold Edwards (W)	901
-Dr. Helen Nunn (B)	1187
1983	
-Norvell Moore (B)	(Unopposed)
1986	
-Dr. Helen Nunn (B)	(Unopposed)

1987	
-Edwin L. Holstead (W)	606
-Norvell Moore (B)	629
1988	
-Bill Sullivan (W)	758
-Curtis "Preacher" Smith (B)	166
1989	
-Harold Sudbury, Jr. (W)	1302
-Thurman J. Green II (B)	287
-Steve Littrell (W)	1299
-Shirley M. Harvell (B)	305
-Steward R. Jerome (W)	1226
-Lawrence B. Haley (B)	374
1990	
-Steve Littrell (W)	810
-Shirley Harvell (B)	135
-Dr. Helen Nunn (B)	(Unopposed)
1991	
-Karen Sue Fraser (W)	927
-Phyllis Bloodworth (W)	388
-Hattie G. Middlebrook (B)	232
-James T. McMahan (W)	861
-Doug Wilson (W)	484
-Shirley M. Harvell (B)	223
1992	
-Bill Sullivan (W)	(Unopposed)
-Bill Stovell III (W)	456
-Shirley Milliken (B)	173

The Court finds that Plaintiffs have shown that the successes enjoyed by black candidates since 1988 fall within the "special circumstances" articulated in *Thornburg v. Gingles*, 478 U.S. 30, 57 n.25 (1986). The only

successful black candidate since that time ran unopposed and was an incumbent. However, the Court would point out that the other black board member, Mr. Moore, was not defeated, but rather chose not to run for reelection.

An analysis of the numbers is helpful. Disregarding bullet voting, incumbency, and whether they won or lost, prior to 1988, the lowest number of votes that any black candidate received was 629 and the highest was 1232. On the average, black candidates received nearly 977 votes. On the other hand, since 1988, the most votes received by any black candidate was 374 and the lowest was 135. The average since 1988 has been 237 votes per black candidate. White candidates received an average total of 1264 votes[1] prior to 1988, with the highest being 2212 and the lowest being 606. Since 1988, white candidates have received an average of 1064 votes, with the highest being 1345 and the lowest being 758. The following chart of averages is helpful.

	White Candidates	Black Candidates
1969-1987	1264	977
1988-	1064	237
Percent Change	15.8%	75.7%

In other words, there has been a significant drop in votes for black candidates beginning in 1988. The Court is of the opinion that none of the black candidates since 1988 have been the "preferred" candidate of the black community. A finding that black voters usually vote for

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[1] Where more than one white candidate ran in one year, the votes they received were totalled. In effect, the results are as if one white candidate ran and received all of those votes.

black candidates and white voters usually vote for white candidates by no means indicates that every candidate, whether white or black, is the preferred candidate of voters of their race. On the contrary, such a finding could also support the conclusion that if the candidate was not the preferred candidate of voters of their own race, those voters would elect not to vote rather than cast their vote for a candidate of the other race.

Although other explanations could exist for the drop in support for black candidates,[2] the Court is of the opinion that plaintiffs have failed to carry their burden to prove that the white majority votes such as to enable it "usually to defeat the minority's *preferred* candidate." *Harvell v. Ladd*, 958 F.2d 226, 229 (8th Cir. 1992).

In this Court's original memorandum and order the following finding of fact was expressed.

> [W]hite voters do not vote in such a manner in the School District to deny black voters representation on the School Board approximately proportional to the black voting population, as evidenced by the fact that *candidates who were the overwhelming choice of the black population have been elected* to the School Board.

Harvell v. Ladd, J-C-89-225, Memorandum & Order at 5 (E.D.Ark. March 19, 1991). Although, the School Board no longer proportionally represents the racial makeup of the district, this finding remains true today. Plaintiffs have

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[2] Complete voter apathy would be one possibility, although the Court is skeptical that such a dramatic drop in voter turnout could be explained simply as "voter apathy" with the system of electing candidates.

failed to show that the reason they are unable to maintain proportional representation is because of the way the white majority votes and not because the most recent black candidates have not been the overwhelming choice of the black population. Indeed, one of the candidates who had been the overwhelming choice of the black population chose not to run for reelection.

H. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

Plaintiffs argue that the School Board was not responsive to complaints they had lodged. Plaintiffs had complained about, among other things, cost-prohibitive extra-curricular activities such as cheerleading, unresponsiveness in recognizing Dr. Martin Luther King's birthday and in implementing black history programs, and the fact that the board filled a vacancy in 1988 with a white man who had allegedly attended no previous School Board meetings instead of Plaintiff Harvell who had been quite active at meetings.

Defendants, on the other hand, point to this Court's previous order which stated that:

> Although plaintiffs Harvell, Middlebrook, and Jones hold the view that the current black School Board members, Dr. Helen Nunn and Dr. Norvell Moore, are not responsive to concerns of black constituents, the current black members of the School Board are the representatives of choice of the overwhelming majority of the black community.

Although Dr. Moore chose not to run for re-election in 1990, the heart of this finding still exists. Dr. Nunn was and continues to be the choice of the overwhelming majority of the black community. Further, the Court credits the testimony of Plaintiff Middlebrook for the proposition that constituents are treated equally in their ability to get on the agenda of the Board and make presentations. Further, Dr. Nunn's testimony persuades the Court that the Board is in fact responsive to the complaints and needs of the black community.

I. Whether the policy underlying the state or political Subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

The Court finds the use of an at-large election scheme is not a practice that can be described as "tenuous." As that term is defined in Webster's Third New International Dictionary, it would represent something that is "not firmly based or supported." On the contrary, the at-large scheme has a legitimate purpose. It offers the obvious advantage of ease in application and prevents divisive arguments and concerns that can be raised between elected officials who represent a defined number of persons in a single election district. Potential disputes between different election districts are avoided. Further, it allows all persons in all corners of a district to vote for several candidates rather than limiting their voice to one member who would represent the interests of a limited number of people. Finally, and perhaps most importantly, it prevents the possibility of the school board itself becoming racially polarized from the members, efforts to

represent the interests of their predominantly black or white districts, constituents.

III. CONCLUSION

The Court orders that these findings be entered pursuant to the opinion of the Eighth Circuit in *Harvell v. Ladd*, 958 F.2d 226, 230 (8th Cir. 1992).

IT IS SO ORDERED this 17th day of December, 1992.

/s/ Stephen M. Reasoner
UNITED STATES
DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 12/18/92 by MKF.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 91-1914

Shirley M. Harvell; Emmanuel Lofton, Reverend; Hattie Middlebrook; Mary Alice Jones; Jacquelin Henton,

Appellants,

v.

Dr. Frank Ladd, Individually and in his official capacity as Superintendent of Blytheville School District No. 5; Blytheville School District No. 5, a Public Body Corporate; Board of Directors, of the Blytheville School District No. 5; William Tomlinson, Individually and as Board Member; Norvell Moore, Individually and as Board Member; William Sullivan, Individually and as Board Member; Harold Sudbury, Jr., Individually and as Board Member; Dr. Helen Nunn, Individually and as Board Member; Karen Fraser, Individually and as Board Member; Steve Littrell, Individually and as Board Member; William Stovell, III, also known as Bill Stovell, Individually and as Board Member,

Appellees.

Appeals from the United States District Court for the Eastern District of Arkansas.

No. 91-2037

Shirley M. Harvell; Emmanuel Lofton; Hattie Middlebrook; Mary Alice Jones; Jacquelin Henton,

Appellees,

v.

Dr. Frank Ladd, Individually and in his official capacity as Superintendent of Blytheville School District No. 5; Blytheville School District No. 5, a Public Body Corporate; Board of Directors, of the Blytheville School District No. 5; William Tomlinson, Individually and as Board Member; Norvell Moore, Individually and as Board Member; William Sullivan, Individually and as Board Member; Harold Sudbury, Jr., Individually and as Board Member; Dr. Helen Nunn, Individually and as Board Member; Karen Fraser, Individually and as Board Member; Steve Littrell, Individually and as Board Member; William Stovell, III, also known as Bill Stovell, Individually and as Board Member,

Appellants.

Submitted: December 12, 1991

Filed: March 2, 1992

Before LAY,* Chief Judge, WOLLMAN, Circuit Judge, and HANSEN, Circuit Judge.

WOLLMAN, Circuit Judge.

Shirley Harvell and other voters in the Blytheville School District appeal from the judgment dismissing the complaint in their suit alleging violations of the Voting Rights Act. The defendants cross-appeal from the district court's denial of their motion for Rule 11 sanctions. We affirm the denial of sanctions, reverse the judgment dismissing the complaint, and remand to the district court for further findings.

I.

The Blytheville School District is a large one, encompassing the city of Blytheville and its adjacent rural areas. The District has a population of 23,500, of which 64% are white and 35% are black. The voting age population, which for Voting Rights Act purposes is the pertinent population, is 14,500, of which 70% are white and 29% are black.[1]

The Blytheville School Board consists of eight members. Each member serves a four-year term, and two

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* The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992, before the opinion was filed.

[1] These figures are from 1980 census data. The district court may, on remand, wish to take notice of data from the 1990 census, some of which should be available.

terms expire each year. Under the election scheme that was in place until 1987, the candidate who received the most votes was elected to the Board, whether or not that candidate received a majority vote. When several candidates would run for one slot, only one of them black, the white vote would be split among the white candidates, while the black vote would concentrate on the black candidate, and the black candidate would be elected.[2] In 1987, pursuant to a new Arkansas statute, this voting scheme was changed, so that now a candidate can be elected only after receiving a majority of the votes. Thus, even if more than one white candidate runs for a position, there will ultimately be a run-off election between the black candidate and the white candidate who receives the highest number of votes.

Historically, blacks have rarely been able to elect a representative to the Blytheville School Board. For the last sixteen years, however, there have consistently been two black members on the eight member board, representation roughly proportional to, the percentage of blacks in the voting age population. All but two of the black members were seated on the Board through unopposed races or through bullet voting. Dr. Helen Nunn defeated a white candidate in 1982, then was reseated in unopposed races in 1986 and 1990. Norvell Moore was elected through bullet voting in 1975 (there were four white candidates). He was reseated in unopposed races in 1979

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[2] This process is referred to colloquially as "bullet voting" or "single-shot voting."

and 1983. As a three-term incumbent, he defeated a white by only twenty-three votes in 1987.[3]

Harvell, who is black, an unsuccessful candidate for the Board of Directors of the District, and four black citizens of the District brought suit under section 2 of the Voting Rights Act in the fall of 1989, after two elections under the new scheme. They challenged the election of school board members at large from such a large district. They proposed an eight-district scheme to replace the at-large scheme, under which one member of the Board would be elected from each district. The district court found that plaintiffs had not shown a violation of the Voting Rights Act and entered judgment in favor of the defendants.

Plaintiffs contend on appeal that the district court erred in finding that sustained minority presence on the Blytheville School Board precluded a finding of a violation of the Act. Plaintiffs further contend that the district court failed to make sufficiently detailed findings to satisfy the requirements of *Buckanaga v. Sisseton Independent School District No. 54-5*, 804 F.2d 469, 472 (8th Cir. 1986). Defendants cross-appeal, contending that the district court erred in denying their motion for sanctions and in refusing to dismiss the case on the basis of laches and equitable principles.

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[3] We understand from oral argument that Moore did not run for reelection in 1991. Two white candidates and one black candidate ran for Moore's seat; one of the whites was elected.

II.

The Voting Rights Act prohibits any state or political subdivision from using any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color[.]" 42 U.S.C. § 1973. In determining whether a violation of the Act has been established, a court must determine whether, based on the totality of the circumstances, "members [of a protected class] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). In making that determination, "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered[.]" *Id.*

A plaintiff alleging a violation of the Act due to multi-member districts must show: first, that the minority group is large enough and geographically compact enough that it would be a majority in a single-member district; second, that the minority group is politically cohesive; and third, that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

Relying on the Senate Report accompanying the Voting Rights Act, the Court also set out factors by which plaintiffs may establish a violation of the Act. These include 1) the extent of a history of official discrimination in the state which touched voting rights; 2) the extent to

which voting is racially polarized; 3) the extent to which the state has used voting practices or procedures which would enhance opportunities for discrimination against minorities; 4) whether minority candidates had been denied access to the slating process; 5) the extent to which minorities have borne the effects of discrimination in relation to education, employment, and health; 6) whether political campaigns have had overt or subtle racial appeals; 7) the extent to which minorities have been elected to public office in the jurisdiction; 8) whether there is a significant lack of responsiveness on the part of elected officials to the needs of minorities; and 9) whether the policy underlying the use of voting qualifications is tenuous. *Thornburg v. Gingles*, 478 U.S. at 36-37; *see also Buckanaga*, 804 F.2d at 471 (setting out same factors); S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. The Senate Report accompanying the amendment, from which the Court drew these factors, emphasizes that this list is not exclusive. S. Rep. No. 471 at 28-29. These factors are not to be used, however, as a "mechanical 'point-counting' device." *Id.* n.118. Instead, the court should, based on the totality of the circumstances and guided by the factors, determine whether the voting strength of the minority group is "minimized or cancelled out." *Id.*

A district court's decision as to whether a Voting Rights Act violation occurred is a finding of fact, which we review for clear error. *Thornburg v. Gingles*, 478 U.S. at 78. Additionally, in a voting rights case, the district court must "explain with particularity the reasoning and the subsidiary factual conclusions underlying [its] reasoning." *Buckanaga*, 804 F.2d at 472. We require the district

court to discuss "not only the evidence that supports its decision but also all the substantial evidence contrary to its opinion." *Id.*

III.

Plaintiffs first argue that the district court did not make the detailed findings required in a Voting Rights Act case and did not discuss all substantial evidence contrary to its decision. We agree. In order to review a district court's findings of fact and conclusions of law, a court of appeals must have before it sufficient detail to enable it to determine the factual and legal bases for the district court's judgment. Fed. R. Civ. P. 52(a); *Buckanaga*, 804 F.2d at 472.

> Because the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision in such a case has the potential for serious interference with state functions, we have strictly adhered to the Rule 52(a) requirements in voting dilution cases and have required district courts to explain with particularity the reasoning and the subsidiary factual conclusions underlying their reasoning.

Buckanaga, 804 F.2d at 472 (quoting *Velasquez v. City of Abilene, Tex.*, 725 F.2d 1017, 1020 (5th Cir. 1984)).

In making its findings, the district court should keep in mind that the question to be answered in a voting rights case is whether, under the totality of the circumstances, and " 'as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to

participate in the political processes and to elect candidates of their choice.' " *Thornburg v. Gingles*, 478 U.S. at 44 (quoting S. Rep. No. 417 at 28).

There was evidence at trial regarding all of the factors listed in *Thornburg v. Gingles*, The district court, however, made findings with respect to only factors seven and eight listed above. In the face of sustained proportional representation, the plaintiffs in a voting rights case may show "special circumstances," such as the minority candidate running unopposed, bullet voting, or incumbency. *Thornburg v. Gingles*, 478 U.S. at 57 and n.25. This list of special circumstances, the Court stated, was meant to be illustrative and not exclusive. *Id.* at 57 n.26.

Here, no black candidate has been elected to the Board in the four years since the election scheme was changed in 1987, though Dr. Nunn was reseated in 1990 in an unopposed election. Only two blacks have ever been elected in contested races, and one of those races involved an incumbent. Thus, representation, while proportional, comes essentially from blacks who ran unopposed. We agree with plaintiffs that successes prior to the 1988 majority vote requirement do not necessarily reflect the black voters' present ability to elect representatives of their choice under the current election scheme. The district court made no findings, however, with respect to the special circumstances that might explain the proportional black representation. The absence of such findings leaves us with an inadequate record to review. Accordingly, we remand this case to the district court for further findings, taking into account the factors set out in *Thornburg v. Gingles* and *Buckanaga*.

Because we remand for further findings, we do not reach plaintiffs' claim that the district court was clearly erroneous in finding that sustained proportional black representation precluded a finding that defendants had violated the Voting Rights Act.

IV.

The district court found that plaintiffs had not brought a frivolous lawsuit and denied defendants' motion for Rule 11 sanctions. We find no error in this ruling. Plaintiffs raised allegations in their complaint that were "well grounded in fact and . . . warranted by existing law." Fed. R. Civ. P. 11. They alleged that their rights under the Act had been violated by the new majority vote requirement and by at-large elections, and they had sufficient knowledge of voting practices within the District to make their claim non-frivolous.

Defendants also claim that the district court erred in refusing to dismiss the case based on laches and equitable principles. Because it found against plaintiffs on the merits of the complaint, the district court found it unnecessary to reach the issue of laches. The district court, not this court, must be the first to decide this issue. We note, however, that plaintiffs brought suit after only two elections under the new voting scheme and eighteen months before any new census data would be available.

The denial of sanctions is affirmed; the judgment dismissing the complaint is reversed, and the case is remanded to the district court for entry of further findings in accordance with the views set forth in this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

SHIRLEY HARVELL; REV. EMMANUEL LOFTON; HATTIE MIDDLEBROOK; MARY ALICE JONES; and JACQUELIN HENTON — PLAINTIFFS

VS. NO. J-C-89-225

DR. FRANK LADD, Individually and in his Official Capacity as Superintendent of the Blytheville, Arkansas School District No. 5; THE BLYTHEVILLE, ARKANSAS SCHOOL DISTRICT NO. 5, A Public Body Corporate; THE BOARD OF DIRECTORS OF THE BLYTHEVILLE, ARKANSAS SCHOOL DISTRICT NO. 5; and the Individual Board Members, WILLIAM "BILL" THOMINSON; NORVELL MOORE; WILLIAM "BILL" SULLIVAN; HAROLD SUDBERRY; HELEN NUNN; KAREN FRAZIER; STEVE LITTRELL; and WILLIAM "BILL" STOVELL, JR., Individually and in their Official Capacities as School Board Members of the Blytheville, Arkansas School District No. 5. — DEFENDANTS

MEMORANDUM & ORDER
(Filed Mar. 19, 1991)

Plaintiffs brought this action pursuant to § 2 of the Voting Rights Act, 42 U.S.C. § 1973, as amended. Plaintiffs contend that the current at-large election scheme for

electing school board directors in the Blytheville, Arkansas School District No. 5 violates the Act by effectively denying the black minority voters in the district an equal opportunity to participate in the political process and to elect representatives of their choice. No constitutional violation is alleged by plaintiffs. Plaintiffs seek declaratory relief and an injunction requiring the Blytheville School District to implement a single member district election scheme with a residency requirement. Defendants deny that there is any violation of the Act and further contend that plaintiffs' complaint should be dismissed on the ground of laches due to plaintiffs' failure to bring this action before the 1980 census data became "stale." This case was tried to the Court on November 8 & 9, 1990. The Court now makes the following findings of fact and conclusions of law:

I. Findings of Fact

1. Plaintiffs are black citizens and electors of the Blytheville, Arkansas School District No. 5 (hereinafter "School District").

2. Plaintiff Shirley Harvell has been an unsuccessful candidate for the Board of Directors of the Blytheville School District (hereinafter "School Board") on two occasions, one in September of 1989 and again in 1990.

3. Defendants are the School District, its superintendent, and the individual members of its School Board.

4. The School District encompasses the City of Blytheville, and adjacent rural areas outside the city limits in Mississippi County, Arkansas.

5. The School Board is composed of eight members elected to designated positions for four (4) year terms in annual elections on an at-large basis. Two positions are subject to election each year.

6. Prior to 1987, a candidate was elected to the School Board if the candidate received a plurality of the votes. As a result of Ark. Code Ann. § 6-14-121, School Board members must now be elected by a majority vote.

7. The 1980 federal census data reflects that the black voting age population for the School District is 28.9%. The black population as a whole in the district is approximately 34%.

8. At the time of the trial of this matter, the 1990 federal census data for the School District was unavailable.

9. The black population in the School District is geographically compact and located on the south side of the City of Blytheville.

10. The black population in the School District is a politically cohesive group.

11. One black candidate was elected to the School Board in 1974, and another was elected in 1975. There have continuously been two black members on the eight member School Board from the 1975 annual election to the present time.

12. The School Board members have historically worked together harmoniously.

13. The election results involving black candidates for the Blytheville School Board from 1969 to 1990 are as follows:

1969	Dr. James C. Guard (W)	1014
	Mrs. Carrie B. White (B)	769
1970	O.W. Weaver (B)	1074
	Mason F. Day, Jr. (W)	2212
1973	W.J. Tomlinson (W)	1068
	Rev. T. J. Green (B)	907
1974	Edwin L. Holstead (W)	415
	Ayre E. "Pop" Lester (B)	1232
	Dan M. Burge (W)	885
1975	George "Preacher" Nichols (W)	182
	Richard "Dick" Reid (W)	582
	Bill D. Jackson (W)	331
	Norvell Moore (B)	1068
	Mrs. Allen Bush (W)	812
1978	Ayre E. "Pop" Lester (B)	(unopposed)
1979	Norvell Moore (B)	(unopposed)
1982	Ayre E. "Pop" Lester (B)	948
	Jerry Nall (W)	1107
	Dr. Helen Nunn (B)	1187
	Harold Edwards (W)	901
1983	Norvell Moore (B)	(unopposed)
1986	Dr. Helen Nunn (B)	(unopposed)
1987	Edwin L. Holstead (W)	606
	Norvell Moore (B)	629
1988	Bill Sullivan (W)	758
	Curtis "Preacher" Smith (B)	166

1989	Harold Sudbury, Jr. (W)	1302	
	Thurman J. Green II (B)	287	
	Steve Littrell (W)	1299	(one year
	Shirley M. Harvell (B)	305	term)
	Lawrence B. Haley (B)	374	
	Stewart R. Jerome (W)	1226	
1990	Steve Littrell (W)	810	
	Shirley M. Harvell (B)	135	

Plaintiff's Exhibit # 13.

14. The black members of the School Board historically have been, and currently are, the overwhelming choice of the black voters in the School District.

15. Although plaintiffs Harvell, Middlebrook, and Jones hold the view that the current black School Board members, Dr. Helen Nunn and Dr. Norvell Moore, are not responsive to concerns of black constituents, the current black members of the School Board are the representatives of choice of the overwhelming majority of the black community.

16. The testimony of Mr. James Lynch at trial, based on analyzing past elections and voting patterns, established that voting in the School District is racially polarized in that usually the majority of black voters vote for black candidates and the majority of white voters vote for white candidates.

17. However, white voters do not vote in such a manner in the School District to deny black voters representation on the School Board approximately proportional to the black voting population, as evidenced by the fact that candidates who were the overwhelming choice

of the black population have been elected to the School Board.

18. The proof in the record is insufficient to establish that plaintiff Harvell's unsuccessful candidacy for the School Board was the result of racial voting patterns.

II. Conclusions of Law

Section 2 of the Voting Rights Act (hereinafter "the Act") provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* that nothing in this section establishes a right to have members of a protected class

> elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1976) (footnotes and citations omitted), the United States Supreme Court set forth the following three-part test for analyzing claims under § 2 of the Act: The Court stated:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district. If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

A violation of § 2 can be proved by showing discriminatory effect. Proof of discriminatory intent is not required to establish a claim under the Act. *Id.* at 35.

Factors which the Court in Gingles considered to be relevant to the determination of a § 2 violation include:

the history of voting-related discrimination; the extent to which voting is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures tending to enhance the opportunity for discrimination;[1] the exclusion of the minority from candidate slating processes; the effects of past discrimination in employment, health care, and education; the use of racial appeals, whether overt or subtle, in campaigns; the extent to which minorities have been elected to office; the responsiveness of elected officials to minority needs; and the policy underlying the use of the contested practice or structure. *Id.* at 44-45.

The Supreme Court in *Gingles* upheld the North Carolina district court's findings of violations of § 2 of the Act in all of the challenged House of Representative and Senate districts in North Carolina except House District No. 23. *Id.* at 80. House District No. 23 was a three person multimember district in which one black had been elected each term, since 1973, to one of three seats.in the district. *See Gingles v. Edminsten*, 590 F. Supp. 345, 349 & 366 (E.D.N.C. 1984). Some of the black victories in House District No. 23 were the result of unopposed elections. *Id.* at 370. A majority of the Supreme Court in *Gingles* found that blacks in House District No. 23 did not have less of an opportunity to elect representatives of their choice. *Gingles*, 478 U.S. at 80.

The Court finds the situation with the Blytheville School Board to be factually similar to the situation in

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[1] Such practices or procedures include unusually large election districts, majority vote requirements, and prohibitions against "bullet voting". *See Thornburg*, 478 U.S. at 45.

House District No. 23 in *Gingles*, rather than any Arkansas House of Representatives or Senate Districts at issue in *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), cited by plaintiffs.[2] As in House District No. 23, there has been sustained electoral success by black candidates in the School District through unopposed races and through contested races. The majority of the Supreme Court in *Gingles* pointed to the sustained electoral success by black candidates in House District No. 23 as a factor inconsistent with a finding of a § 2 violation. *Gingles*, 478 U.S. at 77 & 102. Due to the overriding factor of sustained electoral success by black candidates in the Blytheville School District, the Court finds that black voters in the School District do not have less opportunity to elect representatives of their choice. Accordingly, the Court holds that there is no violation of § 2 of the Act.[3]

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[2] The Court also finds this case to be distinguishable from the Humnoke School District case cited by plaintiffs. In *Sherpell v. Humnoke School District No. 5 of Lonoke County, Arkansas*, 619 F.Supp. 670, 679 (E.D. Ark. 1985), the Honorable George Howard, Jr. found that the at-large election system for school board members was "unconstitutionally maintained for the discriminatory purpose and with the intent of limiting the opportunity of blacks to participate effectively in the political process, and in the election of board members of their choice as well as to prevent black candidates from being elected to the board." However, no black had ever been elected to the Humnoke School Board and numerous other factors indicated discrimination in the school district.

[3] Plaintiffs point out that litigation with regard to the Mississippi County Quorum Court and the City Council of Blytheville has led to the creation of single member districts in the election of members for both of those bodies. However, as the Court understands it, the lawsuits regarding the quorum

In view of the fact that black voters have elected black members to the School Board approximately proportionate to their percentage of voting age population,[4] and in view of the fact that Blytheville enjoys a multiracial school board that works harmoniously together, the Court finds that it would be detrimental to the welfare of the students of the School District to balkanize the district for the mere purpose of increasing black membership on the board by one member. This would create an unfortunate situation where, not only would board members be responsive to only a certain geographic area, but perhaps worse, white board members would be responsive only to white interests and black board members only to black interests.

In holding that there is not a violation of § 2 of the Voting Rights Act in this case, the Court does not foreclose the possibility that at some time in the future the white majority in the School District could consistently vote in such a way as to deny black voters the ability to elect representatives of their choice. However, at this time, the evidence does not support that conclusion.

Despite the Court's holding that there is no § 2 violation, the Court does not find that plaintiffs have brought forth a frivolous lawsuit. Therefore, defendant's motion for sanctions shall be, and hereby is, denied.

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court and city council were settled by agreement of the parties. There was no adjudication by the Court of liability under the Voting Rights Act.

[4] Voting age population percentages are the relevant numbers in voting rights cases. *See Jeffers v. Clinton*, 730 F. Supp. 196, 199 (E.D. Ark. 1989).

It is, therefore, ORDERED that plaintiffs' claim for declaratory and injunction relief is denied, as the Court finds that there is no violation of the section 2 of the Voting Rights Act in this case.[5] Judgment will be entered in favor of defendants, and plaintiffs' complaint shall be dismissed.

It is SO ORDERED this 15th day of March, 1991.

/s/ Stephen M. Reasoner
UNITED STATES
DISTRICT JUDGE

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 3/19/91 by MKF.

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[5] Because the Court finds that there is no violation of § 2 of the Act, there is no need to reach the issue of whether laches should apply in this case.

Supreme Court, U.S.
FILED
MAY 6 1996
CLERK

(2)

No. 95-1351

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

BLYTHEVILLE SCHOOL DISTRICT NO. 5, *et al.*,
Petitioners,

v.

SHIRLEY HARVELL, *et al.*,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals correctly interpreted Section 2 of the Voting Rights Act, consistent with the well-settled principles announced by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and applied by other federal circuits in numerous cases, in holding that minority candidates who received "overwhelming support" from minority voters were the candidates of choice of minority citizens, notwithstanding a decline in the number of votes cast for minority candidates after adoption of a majority vote, runoff requirement to replace the previous plurality system?

II.

Whether the Court of Appeals correctly interpreted Section 2 of the Voting Rights Act in holding that roughly proportional representation by minority candidates under the prior plurality system did not defeat respondents' challenge to the *current* majority vote electoral structure under which, in eight different elections, the only minority candidate seated on the School Board was an incumbent running without opposition?

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Respondents, Shirley Harvell, et al., respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari, filed on February 22, 1996. The Clerk of the Court extended the time for filing the Brief in Opposition to May 6, 1996.

STATEMENT

Minority voters and candidates brought this action in 1989 under Section 2 of the Voting Rights Act, challenging the structure for electing representatives to the Blytheville, Arkansas School Board. The eight Blytheville School Board members are chosen in at-large elections, with numbered posts,[1] staggered terms and, since 1987, a majority vote requirement.[2] According to the 1980 census,[3] the population of the School District was 64 percent white and 35 percent black, while the voting age population was 70 percent white and 29 percent black.

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[1]Two members are elected each year to numbered posts with four-year terms.

[2]Until 1987, elections were by plurality vote. In 1987, however, the Arkansas legislature enacted legislation requiring that all school board members be elected by majority vote. *See* Ark. Code Ann. § 6-14-121.

[3]The 1990 census, which was not available at the time of trial, reported the School District's population as 62 percent white and 37 percent black. App. 3 n.1.

In its initial decision in 1991, the district court found that "the black population in the School District is geographically compact and located on the south side of the City of Blytheville." App. 89. The district court also found that "voting in the School District is racially polarized," App. 91, and that "[t]he black population in the School District is a politically cohesive group," App. 89. The court found that, as of the date of decision, there had been two black members on the Board continuously since 1975, and that such sustained electoral success was inconsistent with a Section 2 violation. App. 95-96. The district court thus dismissed the Complaint. App. 97.

On the first appeal, the Court of Appeals reversed and remanded for further findings. The Court noted that, since the change to a majority vote, runoff requirement, the only successful black candidate had been an incumbent running unopposed. App. 84. The Court indicated: "We agree with plaintiffs that successes prior to the 1988 majority vote requirement do not necessarily reflect the black voters' present ability to elect representatives of their choice under the current election scheme." *Id*.

On remand, the district court entered supplemental findings of fact. The court reiterated its earlier finding that voting in the Blytheville School District is racially polarized, and found that the majority vote requirement adopted in 1987 "may enhance the opportunity for discrimination against African-American voters." App. 67. Looking at elections since 1988, the

court found that the only successful black candidate had been an incumbent who ran unopposed. The court concluded that "the School Board no longer proportionally represents the racial makeup of this district," App. 72, and that "the successes enjoyed by black candidates since 1988 fall within the 'special circumstances' articulated in *Thornburg v. Gingles*, 478 U.S. 30, 57 n.25 (1986)," App. 70.[4]

The district court set out election results showing that between 1988 and 1992, eight African-American, non-incumbents had sought election to the School Board and all had lost. App. 68-71. In 1991, the year the second African-American Board member retired, two African-American candidates ran and lost. *Id.* Yet, the court found, solely on the basis of a drop in total votes cast for African-American candidates after the majority vote requirement was enacted, that "none of the black candidates since 1988 ha[s] been the 'preferred' candidate of the black community." App. 71. The court stated its belief that black voters chose "not to vote rather than cast their vote for a candidate of the other race." App. 72. The court acknowledged that "other explanations could exists for the drop in support for black candidates," but

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[4]*Gingles* indicates: "[T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest." 478 U.S. at 57.

held that the plaintiffs had failed to establish that the white majority votes in such a manner as usually to defeat the preferred candidate of minority voters. *Id.*

On the second appeal, the Court of Appeals for the Eighth Circuit, sitting *en banc*, reversed the district court. Reviewing the district court's application of the analysis set out by this Court in *Thornburg* v. *Gingles* and other cases, the *en banc* Court found no dispute as to the first two of *Gingles*' three preconditions. *See* 478 U.S. at 50-51. "The district court found that Harvell established the first two *Gingles* preconditions. The school district does not contest these findings of geographic compactness and political cohesiveness. We therefore accept them as established." App. 5.

With regard to the third factor -- that the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority's preferred candidate -- the Court of Appeals first noted that the district court's finding of racially polarized voting in School Board elections was "undisputed," supported by the record and "weighs heavily in favor of finding the third *Gingles* precondition established." App. 5. The Court summarized the results of plaintiffs' regression analysis which "strongly supports the conclusion that those black candidates who [ran] in elections from 1988-1992 were in fact the minority-preferred candidates." App. 6-7. The Court noted that "the school district does not contest this statistical evidence and offers no other evidence to contradict the statistical preference." App. 7. As to the district court's

critical conclusion that the unsuccessful African-American candidates since 1988 were not the candidates of choice of black voters, the Court held that speculation about the causes of low voter turnout is an insufficient evidentiary basis on which to reject the strong showing of support among African Americans who did vote. App. 7.

The Court of Appeals next considered whether "the historical fact of proportional or near proportional representation on the school board" precluded a finding of a Section 2 violation. App. 11. The Court rejected the School District's reliance on historical proportional representation for two reasons. First, proportional representation was achieved prior to enactment of the majority vote requirement and "[n]o black candidate has won a contested election since the change in the law." App. 12. The Court noted that if the majority vote requirement had been in place prior to 1988, proportional representation never would have been achieved. App. 12-13. Second, even prior to 1988, "most of the elections won by black candidates were done so as incumbents in the face of no opposition. This is precisely the type of special circumstance recognized in *Gingles*." App. 13.

Reviewing the district court's "totality of the circumstances" analysis in light of these legal errors, the Court of Appeals reiterated that voting is "highly polarized" in school board elections and noted that "[t]here has been only minimal success under the present scheme, with Dr. Nunn's unopposed reseating as an incumbent in 1990 representing the only minority victory in nine attempts," App. 15. Regarding other factors

which *Gingles* indicates are "supportive of, but not essential to" a Section 2 claim, 478 U.S. at 48 n.15, the Court of Appeals found: 1) that the district court gave insufficient weight to the vestiges of a conceded "long history of racial discrimination in the electoral process in Arkansas," which impaired the ability of some African Americans in Blytheville to participate in the electoral process; and, 2) that the majority vote requirement adopted in 1987 enhanced the opportunities for discrimination against African-American voters. App. 16. The Court concluded that, under the totality of the circumstances, plaintiffs had demonstrated that the School Board election scheme diluted minority voting strength and thus had established a violation of Section 2. The Court remanded for "entry of an appropriate remedial decree," cautioning the district court "to steer clear of the type of racial gerrymandering proscribed in *Miller*,[5] while keeping in mind the need to vindicate the

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[5]*Miller v. Johnson*, 115 S. Ct. 2475 (1995). The district court's finding that African-American voters in the Blytheville School District are "geographically compact" suggests that constructing a remedy plan that comports with *Miller* will not be difficult in this case.

Although the dissenting opinion implied, App. 30 n.3, that a single-member districting remedy was unnecessary, and that the majority's reference to such a remedy was therefore also unnecessary, in fact the Arkansas Legislature has *required* such a remedy in school districts with minority population of 10 percent or more, unless the district has been found not to be in violation

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rights of minority voters," App. 18.

Five judges dissented, stating their view that the Court did not sufficiently account for white crossover voting in its analysis of racial bloc voting, that low black turnout meant that the post-1987 candidates supported by black voters were not really the candidates of choice of the black community, and that the pre-1987 success of black candidates and the election of the an unopposed black incumbent in 1990 established that the electoral scheme did not violate Section 2. App. 18-31.

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly stated and applied well-settled law to facts found by the district court and established by undisputed evidence in the record. There is no conflict in the circuits on any issue raised by the Petition. The Question Presented identifies no error of law made by the Court of Appeals, but simply asks this Court to determine whether the district court's conclusions were "clearly erroneous." The basis for the ruling below was, however, legal error. The bulk of petitioners' argument amounts to nothing more than a fact-specific disagreement with the Court of Appeals'

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[5](...continued)
of the Voting Rights Act. Ark. Code Ann. § 6-13-631. *See* App. 16 n.10. The enactment of this provision also indicates that any policy in support of at-large school board elections in Arkansas is weak.

application of black letter law to the uncontested facts of this case. The Petition presents no substantial question that warrants review by this Court.

I. The Court of Appeals Correctly Applied Settled Law Concerning the Definition of the Candidate of Choice of Minority Voters

The Petition raises no issue of law regarding the definition of the candidate of choice of minority voters, as used in the third *Gingles* precondition. *See* 478 U.S. at 51. The record establishes that since enactment of the majority vote requirement, six different African-American candidates, running in a total of eight contested elections, received overwhelming support from African-American voters. App. 7, 9. The district court's sole reason for failing to find that any of these candidates was a candidate of choice of African Americans was the drop in votes cast for African-American candidates in these elections, compared to pre-1988 contests.

The Eighth Circuit carefully rejected any "categorical" conclusion that "a candidate is the minority-preferred candidate simply because that candidate is a member of the minority." App. 6. The Court instead followed the other circuits in holding: "The preferences of the minority voters must be established on an election-specific basis, viewing all the relevant circumstances." *Id.* (citing *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1126 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2779 (1994)).

Petitioners argue that the Court should grant review because the decline in African-American turnout after enactment of the majority vote, runoff law "provides substantial evidence of the African-American community's dissatisfaction with these candidates." Petition at 22. Yet, as found by the Court of Appeals, there is no record evidence as to the cause of the decline in votes cast in favor of African-American candidates. Nothing suggests that a decrease in voter participation reflected dissatisfaction with these six candidates.

The federal Courts of Appeals consistently have concluded that the candidates of choice of minority voters are ordinarily determined on the basis of actual voting patterns in elections. The Sixth Circuit summarized: "courts generally have understood blacks' preferred candidates simply to be those candidates who receive the greatest support from black voters." *Clarke v. City of Cincinnati*, 40 F.3d 807, 810 n.1 (1994), *cert. denied*, 115 S. Ct. 1960 (1995). This Court in *Gingles* described "the essence of a § 2 claim" as "an inequality in the opportunities enjoyed by black and white *voters* to elect their preferred representatives." 478 U.S. at 47.[6] *See also Jenkins v. Red Clay*, 4 F.3d at 1126; *Collins v. City of Norfolk*, 883 F.2d 1232, 1238 (4th Cir. 1989) (minority candidate of choice is the "candidate who received the most black votes"), *cert. denied*, 498 U.S. 938 (1990).

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[6]*See also id.* at 48 (referring to impediment to "ability of minority *voters* to elect representatives of their choice"), 56 ("black *voters*' ability")(emphasis added).

The Court of Appeals for the First Circuit has noted that "[t]he cause of poor turnout is often difficult to detect." *Uno v. City of Holyoke*, 72 F.3d 973, 987 (1st Cir. 1995). Where low voter turnout results from the effects of past discrimination, depressed turnout may itself be probative of dilution. *Id.* at 986-987. The Court in the *Uno* case left open the possibility that "especially low turnout in a particular election may be evidence that factors other than racially based politics (say, poor political organization or lack of minority community support) were the cause of the minority community's inability to elect its preferred candidate in that election," *id.* at 987 n.7. Similarly, the Eighth Circuit in this case recognized: "There may be situations in which voter apathy may be linked to disapproval of a particular candidate, but there is no indication that such is the case here." App. 7. The *en banc* Court reasoned:

> The silence of the minority voters is not so deafening as to warrant a finding that they disapproved of six different minority candidates in light of the uncontroverted statistical evidence that supports a finding of overwhelming support from those blacks who did vote. Nor are the numbers so low as to reduce their statistical significance to a nullity...
>
> ... Under the school district's proferred view, the black voters of Blytheville have gone five consecutive years, six candidates, and eight campaigns without stating a preference, a proposition we cannot accept.

App. 7, 9.[7]

As noted by the *Uno* Court, "even with a modest turnout, the actual votes cast may be probative if a sufficiently strong pattern emerges," 72 F.3d at 986. The Eighth Circuit properly concluded that mere speculation about the causes of low turnout is not sufficient to overcome a strong pattern of preference by those minority voters who actually vote.[8] *Accord Gomez v.*

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[7]The Court of Appeals correctly rejected the School District's effort to characterize two of the six unsuccessful African-American candidates as militants who disenfranchised themselves from the African-American community. "There is no evidence in the record that the minority community viewed any of the six different candidates as in any way inadequate representatives of its interests." App. 11. The Petition blatantly takes testimony out of context in rearguing this point. *See* Petition 23 n.19. For example, Mrs. Harvell's testimony that she "was thought of as a troublemaker" related to "*white* clerks at the *polling place*" who tried to intimidate a black voter. See TR 177-78. Petitioners fail to mention that the reason parents considered Mrs. Harvell ineffective, *see* Petition at 23 n.19, was because of the School Board's unresponsiveness to the black community's concerns. TR 164-65. Nothing in the record indicates that anyone in the *minority* community had negative views of any of the six unsuccessful African-American candidates.

[8]Petitioners argue that the Eighth Circuit's rule would mean that if only one African American votes in an

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City of Watsonville, 863 F.2d 1407, 1415-16 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989)(in analyzing political cohesiveness, court should look "only to *actual*" *voting patterns* rather than speculating as to the reasons" for low minority turnout)(emphasis in original).

In addition, the Eighth Circuit identified powerful reasons to believe that a cause other than dissatisfaction with African-American candidates caused African-American voter participation to decline. White voter turnout also fell and "it stands to reason that when an external stimulus dampens the white turnout it may impact even more greatly on a group that has faced

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[5](...continued)
election and all the rest boycott the election because of dissatisfaction with all candidates, the one African-American vote would determine the candidate of choice of African Americans and the boycott would be irrelevant. Petition at 21. The Eighth Circuit's holding is not so expansive. The Court of Appeals in this case found not just one vote in one election, but a pattern of "overwhelming support" for six different minority candidates. App. 7. If, as petitioners hypothesize, there had been a "boycott" or any evidence of minority dissatisfaction with these six candidates, petitioners had the opportunity to introduce such evidence into the record. The extent of the Eighth Circuit's holding is that where the defendant offers no evidence about the cause of low voter turnout, "speculation" is "inappropriate." App. 7.

historic disadvantages." App. 10. The Court of Appeals also pointed out that "in 1990 the polling place known as a historic black voter stronghold was moved to a predominantly white area ... and the 1990 election produced a record low black turnout for that particular precinct." App. 10 n.5.

II. The Court of Appeals Correctly Addressed the Issue of Proportional Representation

The Court of Appeals applied settled and unexceptional law when it concluded that proportional representation is "an important factor to consider" but that it "does not provide an absolute safe harbor." App. 11. *See, e.g., Johnson v. De Grandy*, 114 S. Ct. 2647, 2660 (1994) (rejecting an "inflexible rule" concerning proportional representation); *id.* at 2664 (O'Connor, J., concurring) ("proportionality ... is always relevant evidence in determining vote dilution, but is never itself dispositive"). The Eighth Circuit found: "[T]he proportional representation on which the school district relies rests on infirm grounds. The electoral success that black candidates achieved under the plurality system is no longer present. No black candidate has won a contested election since the change in the law." App. 12. As found by the Court of Appeals, proportional representation would never have been attained in the first instance had a majority vote requirement been in place prior to 1988. "Norvell Moore would have never won initially to enable him to serve multiple terms ... [and] Dr. Nunn's 1982 victory would have provided the only successful black

candidate in Blytheville history." App. 12-13.

The Petition identifies no error of law with regard to the Eighth Circuit's analysis of proportional representation. The Court of Appeals simply ruled that the results under one election system are not dispositive of the legality of a new, different election system. This ruling is consistent with this Court's teachings and with lower court precedent. The relevance of sustained proportional representation is as an indication of the "minority group's ability to elect its preferred representatives." *Gingles*, 478 U.S. at 77. Where plaintiffs show that "persistent proportional representation ... does not accurately reflect" that ability, this factor loses its probative value. *Id.*

The question in a vote dilution case is not whether the minority group has achieved proportional electoral success as a matter of *history*, but whether the system *currently* dilutes minority voting strength. "Elections held under a significantly different electorial structure ... may be less probative." *N.A.A.C.P. v. City of Niagara Falls*, 65 F.3d 1002, 1012 (2d Cir. 1995). In *Uno v. City of Holyoke*, the First Circuit explained: "The court must determine whether the challenged electoral structure deprives a racial minority of equal opportunity to participate in the political process *at present*. Though past elections may be probative of racially polarized voting, they become less so as environmental change occurs. In particular, elections that provide insights into past history are less probative than those that mirror current political reality." 72 F.3d at 990.

Here, the "environmental change" is clearly apparent. When the majority vote requirement was enacted, the Blytheville School Board had two African-American members, which constituted rough proportional representation. Under the plurality system, this rough proportionality had been maintained for a number of years. However, under the prior plurality system, only once did an African-American candidate win her first election in a head-to-head contest with a white candidate. The others were initially elected with only a plurality of the vote.

After the majority vote requirement was enacted, African Americans lost electorally-achieved proportional representation on the School Board as soon as one of the two sitting incumbents decided not to run for re-election, in 1991.[9] Representation by candidates of choice of

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[9]Petitioners' argument that white crossover voting defeats a finding of legally significant racially polarized voting also is fatally flawed in that it relies solely on pre-1988 elections. From 1988-1992, in eight different contests, no candidate-of-choice of African-American voters received sufficient white crossover votes to be elected, although a longstanding African-American incumbent was reseated unopposed. Since 1988, it has been impossible for an African-American, non-incumbent to win election to the School Board.

The dissent below points only to two elections, Helen Nunn in 1982 and Norvell Moore in 1987, in which African-American candidates of choice arguably received

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African-American voters fell from two to one. Even though six African-American, non-incumbents sought election to the School Board from 1988-1992, in eight contests, not a single one of these candidates won. Each was defeated by white bloc voting.[10] These recent elections most accurately reflect *current* political reality in Blytheville.

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[9](...continued)
a significant white crossover vote, App. 22-23. Of these, Moore, a longstanding incumbent, still won by only 23 votes. In essence, petitioners seek a ruling as a matter of law that these isolated examples compel a finding that more recent sustained losses, under a new majority vote system, by candidates overwhelmingly supported by African-American voters, cannot be attributed to white bloc voting. The petition identifies no legal error or conflict in the circuits on the Court of Appeals' treatment of crossover voting.

[10]Although a second African American was appointed to the Board in 1993, while this case was pending in the Court of Appeals, there is no evidence as to whether this person is a candidate of choice of African-American voters. The Court of Appeals correctly ruled that the appointment of a second African American was not probative of the ability of African-American voters to *elect* the candidate of their choice. App. 14 n.8.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

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